

INVESTMENT ARBITRATION IN CENTRAL AND EASTERN EUROPE

Law and Practice

Edited by

CSONGOR ISTVÁN NAGY

Department of Private International Law, University of Szeged, Hungary

ELGAR ARBITRATION LAW AND PRACTICE



Cheltenham, UK • Northampton, MA, USA

© The Editor and Contributors Severally 2019

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical or photocopying, recording, or otherwise without the prior permission of the publisher.

Published by
Edward Elgar Publishing Limited
The Lypiatts
15 Lansdown Road
Cheltenham
Glos GL50 2JA
UK

Edward Elgar Publishing, Inc.
William Pratt House
9 Dewey Court
Northampton
Massachusetts 01060
USA

A catalogue record for this book
is available from the British Library

Library of Congress Control Number:

This book is available electronically in the
Law subject collection
DOI 10.4337/9781788115179

ISBN 978 1 78811 516 2 (cased)
ISBN 978 1 78811 517 9 (eBook)

Typeset by Columns Design XML Ltd, Reading

CONTENTS

<i>List of contributors</i>	xiii
<i>Preface</i>	xx
<i>Table of cases</i>	xxii
<i>Table of legislation</i>	
Introduction: Intra-EU BITs after Achmea – a cross-cutting issue	1
<i>Csongor István Nagy</i>	
1. Bosnia and Herzegovina <i>Patricia Živković and Yancy Cottrill</i>	14
2. Bulgaria <i>Anton Petrov</i>	24
3. Croatia <i>Mirela Župan and Ana-Marija Čuljak</i>	68
4. Czech Republic <i>Miloš Olík, Michal Čáp and Jaroslav Heyduk</i>	95
5. Estonia <i>Üllar Talviste</i>	137
6. Hungary <i>Veronika Korom</i>	156
7. Latvia <i>Inese Druviete and Ēriks K. Selga</i>	220
8. Lithuania <i>Rimantas Daujotas and Rita Griguolaitė</i>	237
9. Macedonia <i>Ivan Bimbilovski and Elizabeta Spiroska</i>	261
10. Poland <i>Patrycja Treder and Wojciech Sadowski</i>	283
11. Romania <i>Cătălin-Gabriel Stănescu</i>	368
12. Serbia and Montenegro <i>Zoltán Víg and Gábor Hajdu</i>	413
13. Slovakia <i>Alexandra Andhov, Katarína Brocková and Katarína Šimalová</i>	438
14. Slovenia <i>Pavle Flere</i>	508
Index	529

SERBIA AND MONTENEGRO

Zoltán Víg and Gábor Hajdu

A. INTRODUCTION	12.01	<i>GMBH v. Republic of Serbia</i> (ICSID Case No. ARB/11/4)	12.42
B. POLICY AND TREATY LANDSCAPE	12.04	5. <i>UAB ARVI ir ko and UAB SANITEX v. Republic of Serbia</i> (ICSID Case No. ARB0921)	12.44
C. DOMESTIC LEGAL STATUS OF INVESTOR-STATE ARBITRATION	12.13	6. <i>Mera Investment Fund Limited v. Republic of Serbia</i> (ICSID Case No. ARB/17/2)	12.47
1. Serbian law on investments	12.13		
2. Montenegrin law on investments	12.27		
D. DETAILED AND IN-DEPTH ANALYSIS OF THE SERBIAN CASE-LAW FROM AN "INSIDER PERSPECTIVE"	12.35	E. DETAILED AND IN-DEPTH ANALYSIS OF THE MONTENEGRIN CASE-LAW FROM AN "INSIDER PERSPECTIVE"	12.49
1. <i>Mytilineos v. Serbia</i> (II)	12.36	1. <i>Addiko Bank AG v. Montenegro</i> (ICSID Case No. ARB/17/35)	12.50
2. <i>Kunstrans Holding GmbH and Kunsttrans d.o.o. Beograd v. Republic of Serbia</i> (ICSID Case No. ARB/16/10)	12.38	2. <i>MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro</i>	12.51
3. <i>Zelena N.V. and Energo-Zelena d.o.o. Inđija v. Republic of Serbia</i> (ICSID Case No. ARB/14/27)	12.40	3. <i>CEAC Holdings Limited v. Montenegro</i> (ICSID Case No. ARB148)	12.63
4. <i>Club Hotel Loutraki S.A. and Casinos Austria International Holding</i>		F. CONCLUSIONS	12.71

A. INTRODUCTION

The evolution of foreign investment protection in Serbia and Montenegro is quite unique. It is a process not only influenced by the standard post-Cold War transition of formerly socialist countries, but also by the peculiar legacy left behind by Yugoslavia. As successor states, the two countries face complicated legal issues caused by the dissolution of greater Yugoslavia. These issues naturally extend to the field of foreign investment protection, where both Serbia and Montenegro, countries in need of capital, have attempted to move forward and attract investors.

The purpose of this chapter is to show the evolution of Serbian and Montenegro treatment of foreign investments and the related case-law. First, the chapter briefly discusses the historical roots of the current situation, as well as

Chapter 12 SERBIA AND MONTENEGRO

the processes that led to it. Then, the chapter moves on to the 2015 Serbian Law on Investments, as an example of the current state of Serbian legislation on foreign investments. A similar example for Montenegro is provided through the analysis of the 2011 Montenegrin Foreign Investment Law. Finally, the chapter presents several investment cases from the near past that concerned the two countries as respondents.

- 12.03** Through this structure, the chapter aims to provide an accurate summary of the current situation of foreign investments protection in Serbia and Montenegro, and to highlight the observable trends in the field, and to show the likely near-future of foreign investments protection in the two countries.

B. POLICY AND TREATY LANDSCAPE

- 12.04** When discussing the history of foreign investments protection in Serbia and Montenegro, we must begin with Yugoslavia. To be specific, we have to start after the end of the Second World War. Unlike many other socialist countries, Yugoslavia was perhaps more prone to easing relations with the West, and as a result, foreign investment was a more significant question for the country. There are two perspectives that we must mention: the purely legal and the political-economic aspect. The first one is best represented by the investment-centered bilateral treaties (BITs, bilateral investment treaties) signed by Yugoslavia. The second aspect will be discussed interwoven with the progress of Yugoslavian BITs.
- 12.05** There were three waves of concluding bilateral investment treaties by Yugoslavia after the Second World War. The first one was during the 1970s, when Yugoslavia opened towards Western investors. During this time, treaties were concluded with France, Egypt (did not enter into force), the Netherlands, Sweden, Germany and Austria.¹ This was still an era of socialism, and though as mentioned, the country was more open to the West, it still limited the significance of foreign investors and their investments.
- 12.06** The next wave were the treaties concluded during the second half of the 1990s, when Yugoslavia concluded treaties with China,² the Russian

¹ ICSID Bilateral Investment Treaties, www.worldbank.org/icsid/treaties/yugoslavia.htm, accessed 20 October 2017.

² ibid.

B. POLICY AND TREATY LANDSCAPE

Federation,³ Belarus,⁴ FYR of Macedonia,⁵ Poland,⁶ Zimbabwe,⁷ Greece,⁸ PDR Korea⁹ and Ghana.¹⁰ This era was a time of transition and change. Following the Croatian and Bosnian wars, Yugoslavia has fundamentally changed, becoming “small” Yugoslavia, a federation comprised only of Serbia and Montenegro. The treaties conducted in this period were representatives of Yugoslavian attempts at modernizing the economy.

The last wave followed after the regime of Slobodan Milosevic, when treaties were concluded with Italy,¹¹ Ukraine,¹² Turkey,¹³ Austria,¹⁴ Bosnia and Herzegovina,¹⁵ the Netherlands,¹⁶ Nigeria,¹⁷ Spain,¹⁸ Slovenia,¹⁹ Hungary,²⁰ United Kingdom,²¹ Albania,²² Belgium and Luxembourg.²³ This wave represented the final developments in fostering cooperation between Yugoslavia and other capitalist countries, before the federation’s final dissolution. With the end of socialism, and the end of civil wars, the capitalist transition was now in full-swing.

We have to mention that there is no bilateral investment protection treaty in force between the United States and Serbia or Montenegro, however there is a Commercial Relations Treaty still in force concluded between Serbia and the United States of America in the end of the 19th century.²⁴ This is a kind of Navigation and Commerce Treaty. However, this treaty does not contain

³ Yugoslav Law on ratification was published in Official Gazette of Federative Republic of Yugoslavia No. 3/1995.

⁴ ibid No. 4/1996.

⁵ ibid No. 5/1996.

⁶ ibid No. 6/1996.

⁷ ibid No. 2/1997.

⁸ ibid No. 2/1998.

⁹ ibid No. 1/1999.

¹⁰ ibid No. 1/2000.

¹¹ ibid No. 1/2001.

¹² ibid No. 4/2001.

¹³ ibid.

¹⁴ ibid No.1/2002.

¹⁵ ibid No. 12/2002.

¹⁶ ibid.

¹⁷ ibid No. 3/2003.

¹⁸ ibid No. 3/2004.

¹⁹ ibid No. 6/2004.

²⁰ ibid No. 9/2004.

²¹ ibid No. 10/2004.

²² ibid No. 10/2004.

²³ The Serbian and Montenegrin Law on ratification published in Official Gazette of Serbia and Montenegro No. 18/2004.

²⁴ Entered into force November 15, 1882. See Trade Compliance Center, www.tcc.mac.doc.gov/cgi-bin/doit.cgi?204:64:414897148:221, accessed 20 October 2017 or LEXIS, Nexis Library, 1881 U.S.T. LEXIS 26.

Chapter 12 SERBIA AND MONTENEGRO

provisions on the protection of investment, except the following provision in article I: “[the parties] shall enjoy in this respect for their persons and property the same protection as that enjoyed by natives or by the subjects of the most-favored-nation.”²⁵

- 12.09** There is also an Investment Incentive Agreement between the two countries, which entered into force on December 12, 2001,²⁶ and which replaced the Investment Guarantees Agreement concluded between the United States and Yugoslavia in 1973.²⁷ The old, 1973 agreement in its article 2 applied “to guaranteed [United States] investments in projects or activities duly registered in accordance with applicable Host Government [Yugoslav] legislation.”²⁸ Under this agreement, the United States government issued a guarantee to its investors. If for some reason there was later payment made under this guarantee to the investor, the United States Government became successor in rights to the investor.²⁹ For dispute resolution, arbitration was prescribed in accordance with this agreement.³⁰ The new agreement of 2001 has similar provisions. This agreement exempts Overseas Private Investment Corporation³¹ from any regulation that apply to any insurance company or financial organization in Serbia and Montenegro, and at the same time, grants it all the rights and legal remedies that are applicable to any, either domestic or foreign, such organization.³² Similarly to the old agreement, for dispute resolution between the parties it foresees arbitration.³³
- 12.10** The beginning of the new millennium was a time of change for Yugoslavia when it comes to domestic politics. Montenegro and Serbia started drifting away, first becoming independent of each other de facto, and later, de jure. This led to the official dissolution of the Yugoslavian federation, and the creation of two independent states.

25 ibid.

26 Investment Incentive Agreement between the Federal Government of the Federal Republic of Yugoslavia and the Government of the United States of America, Official Gazette of the Federative Republic of Yugoslavia, No. 12/01.

27 See ‘Investment Guarantees Agreement’ LEXIS, Nexis Library TIAS 7630, 24 U.S.T. 1091 and 1973 U.S.T. LEXIS 149.

28 ibid art. 2.

29 ibid art. 3.

30 ibid art. 6.

31 According to the agreement OPIC offers investment support, credits, support to investment to shares, investment insurance and reinsurance. See art. 1. of Investment Incentive Agreement between the Federal Government of the Federal Republic of Yugoslavia and the Government of the United States of America, Official Gazette of the Federative Republic of Yugoslavia, No. 12/01.

32 ibid art. 2.

33 ibid art. 5.

C. DOMESTIC LEGAL STATUS OF INVESTOR-STATE ARBITRATION

Lastly, we should mention the unique situation of the before-mentioned BITs. Originally, these BITs and other international treaties were federal in nature. This means that following the dissolution of Yugoslavia, its primary successor state, Serbia, “inherited” these treaties. 12.11

In general, we can see that Yugoslavia, sans the unique disruptions caused by civil war and the federation dissolving, followed a very similar model of economic transition as the other formerly socialist countries. However, in Yugoslavia’s case, this opening was theoretically more advanced from the start, due to having a more open relationship with the West, starting with the 1970s. Obviously, it could be also argued that this advantage was squandered during the transition period. 12.12

C. DOMESTIC LEGAL STATUS OF INVESTOR-STATE ARBITRATION

1. Serbian law on investments

Within the scope of this chapter, we feel it unnecessary to discuss outdated investment laws, and so, the focus shall be on the two currently applicable investment laws in Serbia and in Montenegro. 12.13

The 2015 Serbian Law on Investments (hereinafter: Serbian Law), replacing the old 2002 Law on Foreign Investments, presents a new framework for foreign investments in Serbia. Therefore, it would be worthwhile to discuss the general structure, mandated standards and specific characteristics of the Serbian Law. 12.14

When it comes to structure, the Serbian Law is comprised of 48 articles, divided into nine parts. These parts follow the typical makeup of an investment law. First are introductory provisions, followed by investor’s rights, with the third part detailing the types and criteria for investments. The fourth part concerns the subjects that support investments (namely, the Council for Economic Development, the Ministry in charge of economic affairs, the Development Agency of Serbia, autonomous provinces and local governments). The afore-mentioned Council for Economic Development is also the subject of the law’s fifth part. Similarly, part six focuses on the Development Agency of Serbia. Parts seven and eight provide for supervision and penalties, respectively. And not unexpectedly, part nine details the Serbian Law’s transitional and final provisions. 12.15

Chapter 12 SERBIA AND MONTENEGRO

- 12.16** After reviewing the basic structure of the Serbian Law, the next step is to go over the particulars that are noteworthy enough to be analyzed here. In particular, the first and second parts (introductory provisions and investor's rights) should be examined in more detail. First of all, Article 2 concerns itself with the goals of the Serbian Law. This can be summed up as a typical segment of laws on foreign investments, as it names the advancement of investment environment, for the purposes a stronger economy, as its chief goal. The article also highlights a desire to create a more attractive business environment for both domestic and foreign investors, in part by equalizing their treatment, and in part by increasing the efficiency of governmental services in relation with investments.
- 12.17** Article 3 should also be highlighted, as it contains the definitions, which are highly relevant when it comes to investment laws. To be specific, it is necessary to look at the definitions of investment and investor. Paragraph 2 of Article 3 defines investment as:
- (a) Commercial company or branch of a commercial company established by the investor, in accordance with the law regulating the commercial companies in the Republic of Serbia;
 - (b) Stake in a commercial company, shares of a commercial company or other securities equivalent to shares of the company in terms of the law that regulate the securities market in the Republic of Serbia;
 - (c) Rights acquired by the investor through contracts on public-private partnership in accordance with the law that governs public-private partnership in the Republic of Serbia;
 - (d) Property rights, easements, lien and other property rights on movable and immovable property located on the territory of the Republic of Serbia acquired by the investor for the purpose of conducting business;
 - (e) Intellectual property rights that enjoy protection according to the applicable law of the Republic of Serbia;
 - (f) Rights to conduct business for whose operation a license or approval of a state authority is a prerequisite, acquired in order to conduct investor's business on the territory of the Republic of Serbia, in accordance with the law.
- 12.18** As it can be seen, the definition is sufficiently thorough and covers a wide range of concepts that could be considered investments. And when it comes to investor, paragraph 2 provides a definition: "4) Investor is a legal or natural person who invested capital, as well as a person who acquired the investment referred to in item 2) of this Article, on the territory of the Republic of Serbia, in accordance with the law."

C. DOMESTIC LEGAL STATUS OF INVESTOR-STATE ARBITRATION

Therefore, the Serbian Law recognizes both natural and legal persons (not restricting it either to domestic or foreign) as investors, provided they invested capital, or otherwise acquired an investment fitting the definition provided in paragraph 2. The law furthermore clarifies the meaning of foreign investor (a crucial definition in investment protection) in paragraph 5 as follows: **12.19**

- 5) Foreign investor is a person who invested capital, as well as a person who has acquired through appropriate legal means the investment referred to in item 2) of this Article, on the territory of the Republic of Serbia, and who is:
 - (a) A foreign legal person whose corporate seat is abroad, including a branch of a foreign legal person which is registered in the Republic of Serbia,
 - (b) A foreign national, regardless of the permanent place of residence,
 - (c) A citizen of Republic of Serbia with a permanent place of residence out of the Republic of Serbia longer than one year.

Thus, it can be concluded that the Serbian Law uses the corporate seat for considering a legal person foreign, instead of incorporation or other method of determining the nationality of legal persons. Furthermore, it is interesting to note that the Serbian Law treats Serbian citizens as foreign investors, provided they had a permanent place of residence outside Serbia for more than a year. **12.20**

And finally, it should be noted that the Serbian Law also defines what specifically doesn't constitute an investment under it in paragraph 11: **12.21**

Investment, in terms of this Law, shall not be:

- a) A pecuniary or other claim which stems directly from a commercial transaction (sale, barter, provision of services, and other);
- b) A pecuniary claim which stems from a credit facility connected to a commercial transaction (financing of trade and so on);
- c) A portfolio investment.

After analyzing the introductory provisions, it is prudent to move on to the second part, the investor's rights. This is arguably the most significant part of the Serbian Law, as it contains rules on expropriation, standards of treatment, and dispute resolution. To begin with, Article 6 details expropriation. As expected of a law intending to promote foreign investment, it explicitly prohibits subjecting investments to direct or indirect expropriation, or to measures that have an effect that equals expropriation. However, it makes an exception for public interest, but limits such seizures by requiring them to be non-discriminatory, in a procedure prescribed by law, and also mandates the **12.22**

Chapter 12 SERBIA AND MONTENEGRO

payment of adequate compensation without delay. This compensation is to include both expropriated immovable property and decrease of value of business as its basis. We can say that all this corresponds to international standards.

- 12.23** Article 7 contains the treatment standard of the Serbian Law, what is national treatment. This article mandates that foreign investors, in terms of their investments, should enjoy equal status and have the same rights and obligations as domestic investors. It is interesting to note that the Serbian Law does not explicitly provide for the most favored nation treatment, nor does it include the popular fair and equitable treatment standard.
- 12.24** Finally, Article 10 seemingly provides a very basic framework for dispute resolution. The Serbian Law does not contain actual rules on the procedure, but instead generally states that disputes arising from investments may be resolved before courts or arbitration tribunals. Therefore, it seems like this can hardly be considered even a basic framework. It is more like a blank provision, to be filled out with actual content by later regulations.
- 12.25** The latter passages of the law are not truly relevant to the purposes of this chapter. However, two elements still bear some highlighting, namely part five, dealing with the Council for Economic Development, and part six, dealing with the Development Agency of Serbia.³⁴ As detailed by Articles 25 and 26, the Council for Economic Development can be considered a political supervision body over investments, given its membership (appointed by the Government, mandatory members mostly being ministers) and its competence (monitoring tasks and making “big picture” decisions in investment incentivizing). By contrast, the Development Agency of Serbia (hereinafter: Agency) plays a more significant practical role, having its own legal personality, as provided by Article 28. The Agency also possesses its own separate board of directors and a director, each endowed with separate tasks (as per Articles 31, 32 and 33). As shown by Article 36, these tasks mostly involve the practical management of investment affairs in Serbia by cooperating with state authorities, performing various expert, administrative and operative activities related to projects of attracting direct foreign investments. It also monitors the realization of these projects.
- 12.26** In conclusion, it can be stated that the new Serbian Law on Investments is principally a framework document, as it establishes only very basic substantive rules (in relation to investor's rights, and similar questions), and instead

³⁴ <http://ras.gov.rs/en>, accessed 13 March 2018.

C. DOMESTIC LEGAL STATUS OF INVESTOR-STATE ARBITRATION

focuses on the procedural side of the question. Still, despite its shortcoming in this department, this Law can be considered a clear symbol of Serbia's intent to attract foreign investors, and is adequate enough to provide the basic conditions for such investments.

2. Montenegrin law on investments

After the discussion of the current Serbian Law on Investments, the next logical step is to briefly analyze the Montenegrin Foreign Investment Law of 2011 (hereinafter: Montenegrin Law), which was later amended in 2014. First the general structure of the Montenegrin Law is explained, followed by the highlighting of important provisions (definitions, standards of treatment, etc.) that could be considered relevant for the chapter. 12.27

Therefore, the first step is to discuss the general structure. The Montenegrin Law is comprised of 34 articles, divided into eight parts. Despite some superficial similarities, the structure is ultimately quite different to the Serbian Law on Investments (although this might be partially considered the result of the difference in scope: the Serbian Law deals with both domestic and foreign investments, while the Montenegrin one is solely concerned with the latter). The first part discusses general provisions, as expected. The second part deals with modes of foreign investment, while the third is about the principles of foreign investment. The fourth part enumerates issues related to the protection of foreign investors, and the fifth part deals with the incitement and promotion of foreign investments. The sixth part provides rules for the recording of foreign investments. The seventh part talks about the settlement of disputes, and the final part contains transitional and final provisions. Therefore, the makeup of this law is significantly different to Serbian Law. 12.28

For the purposes of this chapter, the first, second, third, fourth and seventh parts are of particular interest. Starting with the first part, we can already see major differences when compared to the Serbian Law. First of all, the Montenegrin Law forgoes the in-depth explanation of the law's goals, and instead opts for a short, mostly descriptive and non-declarative summary in Article 1. This article restrains itself to purely explaining the scope of the law (regulating foreign investment, the rights of foreign investors, etc.). In a similar succinct vein, the rest of the first part (Articles 2 and 3) hardly bothers with definitions. Unlike the lengthy definitions section of the Serbian, the Montenegrin one only deals with the definition of foreign investor, who is simply described as a foreign legal entity or individual; a legal entity having at least 10% share of foreign capital in the total entity's capital, a legal entity established in Montenegro by a foreign individual, or a citizen of Montenegro 12.29

Chapter 12 SERBIA AND MONTENEGRO

having place of residence abroad. As it can be seen, the definition is significantly less detailed and vaguer. In particular, unlike the Serbian Law, which requires Serbian citizens to have a place of permanent residence abroad for more than a year, the Montenegrin definition merely requires a place of residence, permanent or not, and with no time requirement. To further expound on this theme of barebones regulation, Article 3 laconically sums up what constitutes a foreign investment: a pecuniary investment, an investment in goods, services, proprietary rights or securities. Once again, it can be stated that the Montenegrin Law's definitions section is loose.

- 12.30** Moving on, the second part of the Montenegrin Law deals with modes of foreign investments. This short section's Article 4 details the methods by which a foreign investor can make its investment in Montenegro. Namely, by establishing an enterprise (alone or jointly with other investors), establishing a foreign entity affiliate, acquiring interest and shares in the legal entity, or by purchasing an enterprise. Meanwhile, Article 5 provides a provision for the execution of foreign investments: concession agreement, franchising agreement, agreement on financial leasing, agreement on sale and purchase of real estates and other arrangements. In this part, the Montenegrin Law once again uses a much more succinct wording in its provisions when compared to the Serbian Law.
- 12.31** The third part of the Montenegrin Law deals with foreign investment principles. Article 6 provides national treatment to foreign investors. Curiously, Articles 7, 8 and 9 all deal with foreign investment in the manufacturing and trade of armaments and military equipment. In these cases, Article 7 mandates that foreign investors must jointly invest into such ventures with national legal entities or individuals, and cannot possess more than 49% of the share in capital or interest in such an enterprise. Articles 8 and 9 further build on this, tying foreign investments in the military industry to strict rules and approval by the state authority in charge of foreign trade. And finally, Article 10 succinctly declares that investments in financial enterprises also fall under the scope of this Law.
- 12.32** The next in sequence is the fourth part of the Montenegrin Law, dealing with the protection of foreign investors. The fourth part comprises of two articles, articles 11 and 12. Article 11 guarantees that the assets of foreign investors may not be subject to expropriation, except when public interest is determined by or on the basis of law, in which case compensation shall be paid. When compared to the discussed Serbian regulation on expropriation, this provision provides significantly more discretionary powers to Montenegrin authorities on expropriation, chiefly due to the not so well-defined concept of public

D. DETAILED AND IN-DEPTH ANALYSIS OF THE SERBIAN CASE-LAW

interest and compensation. To continue, Article 12 once again reflects the peculiar priorities of Montenegrin legislation, as foreign investors are guaranteed domestic treatment in case of damages as a consequence of war or emergency. Similarly, it also guarantees compensation for damage caused by unlawful or irregular work of a public official or public authority. The inclusion of these provisions is quite unnecessary, as national treatment should already cover both cases, yet the law explicitly (and redundantly) outlines them here as well.

Finally, the seventh part, concerning the settlement of disputes, should also be mentioned. Unlike the Serbian Law, this one mandates the use of Montenegrin domestic courts to resolve disputes arising from foreign investment in Article 30, unless a specific agreement stipulates arbitration. Interestingly, the Law can also mandate the use of ICSID rules for disputes where one of the contracting parties is the Montenegrin government, and UNCITRAL rules for disputes where the contracting parties are domestic or foreign legal entities and natural persons. These provisions are thus significantly more detailed (a rarity in this Law) and rigid than the ones found in the Serbian Law. **12.33**

Notwithstanding the narrower scope of the Montenegrin Law, we can conclude that Montenegro had different priorities when compared to Serbia. In some aspects, Montenegro used even vaguer language than Serbia, but in certain key aspects, such as dispute resolution or questions concerning the military industry, it went into much more detail. The provisions were also generally more strict and rigid than the more investor-friendly Serbian rules. In its current form, there is still room for significant improvement, especially when compared to other modern legislation on the subject. **12.34**

D. DETAILED AND IN-DEPTH ANALYSIS OF THE SERBIAN CASE-LAW FROM AN "INSIDER PERSPECTIVE"

This part of the chapter will attempt to showcase the Serbian treatment of foreign investments in practice. This will be accomplished through five ICSID and one UNCITRAL case, all of which had Serbia as its respondent. These are the most relevant investment cases for the purposes of this chapter. **12.35**

1. *Mytilineos v. Serbia (II)*

This case concerned the Greek corporation known as Mytilineos Holdings (hereafter: Claimant). The Claimant signed multiple collaboration agreements with a Serbian state-controlled company, known as RTB-Bor. RTB-Bor was **12.36**

Chapter 12 SERBIA AND MONTENEGRO

one of the largest metallurgical and mining companies³⁵ for copper extraction and production in the world (a typical socialist giant of strategic importance once). These collaboration agreements date back to 1996, and under their provisions, RTB-Bor was obliged to pay the Claimant regularly in metal and money, in exchange for the working capital and copper ore provided by the Claimant. However, starting from 2004, RTB-Bor refused to honor its obligations towards the Claimant. The Claimant was furthermore unable to seek resolution for this issue in Serbia, as the Serbian Government took a number of administrative and legal measures in order to prevent the enforcement of RTB-Bor's obligations.

- 12.37** As a result of this, the Claimant turned to the Permanent Court of Arbitration in 2014, invoking the 1998 BIT between Greece and Serbia³⁶ as a basis for its claims. The resulting arbitration case was then administered according to UNCITRAL rules. The Claimant alleged indirect expropriation, and breach of the requirement of fair and equitable treatment, which included claims that the Serbian state denied justice to the Claimant. The requested damages amounted to USD 100 million. Although the award's full text is not public, it is known from the Claimant's press release³⁷ and various journalistic writings, that the Tribunal accepted the Claimant's allegations, and found that the measures taken by Serbia between 2004 and 2012 to prevented the enforcement of RTB-Bor's obligations amounted to indirect expropriation without compensation, and frustrated the Claimant's legitimate and reasonable expectations to be afforded fair and equal treatment by the host country. However, it ultimately only awarded USD 40 million to the Claimant in 2017. The award, as mentioned before, was not made public. According to the Serbian media, there is another case going on against RTB Bor lodged in front of a Greek court for USD 60 million. The above mentioned Greek company claims in this case that RTB Bor did not fulfill three contracts concluded in the nineties.³⁸ However, some sources claim that Mytilineos promised to revoke its claim, once the above mentioned USD 40 million is paid by Serbia.³⁹

35 In the Serbian media it is sometimes referred to as "mine of debts."

36 <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1478>, accessed 18 March 2018.

37 <www.4-traders.com/MYTILINEOS-HOLDINGS-1408783/news/MYTILINEOS-PREVAILS-IN-INTERNATIONAL-ARBITRATION-AGAINST-SERBIA-REGARDING-RTB-BOR-25020514/>, accessed 18 March 2018; www.reuters.com/article/us-mytilineos-serbia-arbitration/mytilineos-wins-40-million-compensation-in-arbitration-against-serbia-idUSKCN1B90ZG, accessed 18 March 2018.

38 <https://insajder.net/sr/sajt/vazno/9600/>, accessed 18 March 2018.

39 <https://naslovi.net/2018-02-09/insajder/mitilineos-povlaci-tuzbu-protiv-rtb-bor-nakon-isplate-duga-od-40-miliona-evra/21204425>, accessed 18 March 2018.

D. DETAILED AND IN-DEPTH ANALYSIS OF THE SERBIAN CASE-LAW

2. *Kunsttrans Holding GmbH and Kunsttrans d.o.o. Beograd v. Republic of Serbia* (ICSID Case No. ARB/16/10)

This case arose out of a dispute between the National Museum of Serbia, and the Claimant, an Austrian investor (Kunsttrans). The investor signed a contract with the National Museum of Serbia in 2006, concerning the storage of artworks during the renovation of the Museum. Kunsttrans undertook to have a specialized storage facility built by 2007, and to store the artworks until the end of the renovation, but at least until 2011, while the Museum to pay fee for this (about EUR 35,000 per month). The Serbian Government officially supported the deal. The next year both the officials of the Museum and of the Ministry established that Kunsttrans fulfilled its obligation to build the storage. However, the Museum after this did not move the artworks to the storage and did not pay the monthly fee.⁴⁰

Kunsttrans sued the Museum in the Serbian courts for the fees. However, after several years of litigation, in 2016 Kunsttrans decided to refer its case to ICSID arbitration, based on the Austro-Serbian BIT of 2001, alleging that the Museum failed to pay over EUR 500,000 in rental fees for the usage of the above mentioned facility. After the establishment of the Tribunal by July, the actual proceedings started in September 2016. Based on the available procedural information, the case transitioned to issues of merit quite early, and as of today, it is still pending.

3. *Zelena N.V. and Energo-Zelena d.o.o Inđija v. Republic of Serbia* (ICSID Case No. ARB/14/27)

In this case, the Belgian Claimant was operating an animal-rendering facility in the town of Indjija, Serbia. The issue arose from the allegation that the Serbian Government failed to equally enforce legislation on the handling of hazardous animal by-products, which caused the Claimant's facility to become unviable due to the advantages thus enjoyed by its competitors, who benefited from the lack of enforcement.

Thus, the institution of arbitration proceedings was requested in November 2014, in order to resolve the dispute based on the Belgium-Luxembourg-Serbia BIT of 2004. The Tribunal was established by January 2015, with its

⁴⁰ VREME no. 1353 8. DECEMBER 2016, www.vreme.com/cms/view.php?id=1449070, accessed 18 March 2018, See also Kunsttrans' statement on the issue: www.kunsttrans.rs/news/Ko%20je%20Kunsttrans%20i%20sta%20radi%20sa%20Narodnim%20muzejem%20u%20Beogradu.pdf, accessed 18 March 2018.

Chapter 12 SERBIA AND MONTENEGRO

first session commencing in April 2015.⁴¹ Since then, the case has been ongoing, with the last publicly available procedural detail coming from May 2017.

4. Club Hotel Loutraki S.A. and Casinos Austria International Holding GMBH v. Republic of Serbia (ICSID Case No. ARB/11/4)

12.42 In this case, Greek and Austrian investors came into conflict with the Serbian national lottery. Claimants were attempting to develop a casino in Belgrade, however, issues arose concerning the rights under the relevant licensing agreement, in particular, the right to operate a casino in Belgrade.

12.43 Therefore, the Claimants turned to investment arbitration to resolve the issue, filing a request to the ICSID in January 2011, based on the Greek-Serbian BIT of 1997 and the Serbian-Austrian BIT of 2001. The Tribunal was constituted by April 2011. However, the proceedings were suspended by the parties' agreement, and were ultimately discontinued by January 2012, at the parties' request. The exact details of what settlement was reached by the disputing parties are not publicly available.⁴²

5. UAB ARVI ir ko and UAB SANITEX v. Republic of Serbia (ICSID Case No. ARB0921)

12.44 In this case, the Republic of Serbia came into conflict with a Lithuanian investor. This investor acquired shares in the Serbian fertilizer manufacturer known as HIP Azotara, through a Serbian investor who originally acquired these shares from the Serbian Government through a privatization agreement. The parties came into dispute following the alleged indirect expropriation of the Lithuanian investor's shares in the fertilizer manufacturing company, and a breach of fair and equitable treatment, including alleged denial of justice.

12.45 This dispute led to the registration of a request for the institution of arbitration proceedings by the Secretary-General of the ICSID in December 2009. The case's proceedings were based on the Lithuania-Serbia BIT of 2005, as well as the Lithuania-Serbia-Montenegro BIT of 2005, although the reasons for the involvement of the latter are not publicly known. After the first session in September 2010, the dispute proceeded for multiple years, until March 2015, where the Tribunal rendered its award. The contents of this

41 <http://investmentpolicyhub.unctad.org/ISDS/Details/582>, accessed 18 March 2018.

42 http://konrad-partners.com/fileadmin/docs/media/IntArbReview_Austria_2013.pdf, accessed 18 March 2018.

D. DETAILED AND IN-DEPTH ANALYSIS OF THE SERBIAN CASE-LAW

award were not made accessible to the public, although it is known that one of the arbitrators attached a separate opinion to the award.

According to the Serbian media, in the meantime Serbian authorities initiated proceedings against several persons, including the management of the company and officials of the Serbian Privatisation Agency, accusing them with abuse of their position and misvaluing property.⁴³

6. *Mera Investment Fund Limited v. Republic of Serbia* (ICSID Case No. ARB/17/2)

This claim was filed against Serbia by a Cypriot company known as Mera Investment Fund Limited, on January 26, 2017. The arbitration tribunal was constituted in May, and held its first session in August. The materials related to the case are not yet open to the public. However, according to the Serbian press the owner of Mera Investment Fund is Marko Miskovic. He is the son of Miroslav Miskovic, a Serbian oligarch who is distanced by the current Government. Miskovic and his son are suspected for illegal extraction and appropriation of funds and assets from several road companies from 2005 to 2010 using among others Mera Investment Funds, and caused damage to several construction companies in the sum of EUR 148 million, and to the budget of Serbia in the amount of EUR 4 million.⁴⁴

We suppose that the claim has been filed based on the Serbian Cypriot BIT.⁴⁵ According to article 1 (3) of the Treaty, the term “investor” shall mean: ... “b) a legal entity incorporated, constituted or otherwise duly organised according to the laws and regulations of one Contracting Party having its seat in the territory of that same Contracting Party and investing in the territory of the other Contracting Party.” Thus, formally Mera Investment Fund is a Cypriot company, however, de facto its owner is a Serbian citizen (not a foreign investor in Serbia).

43 www.novosti.rs/vesti/naslovna/aktuelno.291.html:377054-Slucaj-Azotara-Pritvor-za-trojicu-osumnjicanih, accessed 18 March 2018.

44 www.balkaninsight.com/en/article/vucic-s-government-made-no-promised-progress-on-tackling-corruption-04-07-2016, accessed 18 March 2018; <http://balkans.aljazeera.net/vijesti/saslusani-prvi-svjedoci-protiv-miskovica> <http://www.blis.rs/vesti/hronika/svedocio-direktor-mera-investa-naloge-mi-je-davao-marko-miskovic/687x8nk>, accessed 18 March 2018.

45 Agreement Between Serbia And Montenegro And The Republic Of Cyprus On Reciprocal Promotion And Protection Of Investments, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/4766>, accessed 18 March 2018.

Chapter 12 SERBIA AND MONTENEGRO

E. DETAILED AND IN-DEPTH ANALYSIS OF THE MONTENEGRIN CASE-LAW FROM AN “INSIDER PERSPECTIVE”

12.49 When it comes to Montenegro, there are not many cases related to foreign investment, especially when compared to Serbia. Therefore, in this part, the chapter takes a more in-depth approach. Out of the three cases, two will be analyzed in significant detail, thanks to their publicity and abundance of information. These three ICSID cases will provide an adequate picture of how Montenegro deals with foreign investment in practice.

1. *Addiko Bank AG v. Montenegro* (ICSID Case No. ARB/17/35)

12.50 The latest ICSID case against Montenegro has been filed on September 19, 2017, the Claimant being Addiko Bank AG, an Austrian banking company that operates a network of banks across Montenegro, Slovenia, Croatia, Bosnia and Herzegovina and Serbia,⁴⁶ based on the investment protection treaty concluded between Yugoslavia and Austria in 2002.⁴⁷ The claim was filed against Montenegro due to a Montenegrin law⁴⁸ enacted in 2015 and amended in 2016 that requires lenders to convert the Swiss franc denomination of mortgages and other loans to Euro on the exchange rate on the date when the loan was taken with annual 8% interest rate. The subsequent amendment of the law made further easements to the clients. The Bank argued that retroactive application of the law is against the principle of legal certainty, and initiated a procedure of constitutionality of the law in front of the Montenegrin Constitutional Court, and later, as already mentioned above ICSID arbitration, at the same time, asserting to the press that it is willing to settle the dispute amicably.⁴⁹ Contemporaneous similar claims have been filed against Croatia by connected banking companies over a similar law in Croatia. Further details are not yet available publicly.

2. *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*

12.51 Let us first review the factual background of the case. Zeljezara Niksic AD Niksic (ZN) was Montenegro’s sole arc furnace steel mill, originally state-owned, and considered one of the largest manufacturing companies of Montenegro. It was privatized in 2006, when MN Specialty Steel Ltd. (MN)

⁴⁶ www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=268309989, accessed 18 March 2018.

⁴⁷ www.podaci.net/_z1/3127857/S-autupz02v0201.html, accessed 18 March 2018.

⁴⁸ www.paragraf.me/propisi-crnegore/zakon_o_konverziji_kredita_u_svajcarskim_francima_chf_u_eure_eur.html, accessed 18 March 2018.

⁴⁹ <http://paragraf.me/dnevne-vijesti/14112017/14112017-vijest4.html>, www.bankar.me/2017/11/11/addiko-banka-pokrenula-arbitrazu-protiv-drzave-zbog-konverzije-kretita-u-svajcarnica/, accessed 18 March 2018.

E. DETAILED AND IN-DEPTH ANALYSIS OF THE MONTENEGRIN CASE-LAW

successfully bid for 66.7008 percent of the share capital of ZN. Later in that year, MN signed the shares sales agreement with the relevant government actors. Under this agreement, MN was obliged to make a series of investments. In particular, MN agreed to invest an aggregate amount of EUR 114 million, in a five-year period from the closing of the privatization agreement, with a minimum annual investment amount set by the parties (EUR 14 million in 2007, EUR 20 million in 2008, EUR 40 million in 2009, EUR 20 million in 2010 and EUR 20 million in 2011). However, it appeared that ZN struggled to meet its obligations after the 2006 privatization, as production volumes were increased, without adequate working capital funding. This constrained ZN's ability to improve the steel mill's functioning. These difficulties led to MN selling its shares in ZN to one of the Claimants, MNSS B. V. (MNSS), a private company constituted under the laws of the Netherlands. This was done under a Share Purchase Agreement (SPA), for an aggregate consideration of EUR 16,651,799 of which EUR 2,023,597 was attributed to the ZN shares, and EUR 14,628,202 to the assigned MN assets. The consideration of the SPA was satisfied through a cash payment of EUR 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 circa EUR 1.9 million, and the issuance of a 19% shareholding of MNSS by MN. A few days before this agreement took place, the Government of Montenegro amended the original privatization agreement in relation to the timing and amounts of required capital expenditure to be invested. In relation to this, MN assigned its rights under this agreement to MNSS in 2008. Besides this equity investment, MNSS made five loans to ZN between 2008 and 2011.

In 2009, MNSS assigned its outstanding loan claims under its first loan to the other Claimant, Recupero Credito Acciaio N.V (RCA), a private company constituted under the laws of Curaçao. The maturity date of the first loan was extended twice, first as part of a ZN refinancing plan approved by the Montenegro government, and second, as part of a restructuring plan. Before the agreement between MN and MNSS, MN and ZN had used Prva Banka. MNSS continued to use this Bank in relation to its obligations under the privatization agreement and for other purposes. **12.52**

However, this bank suffered a liquidity crisis in 2007, which only worsened with the financial crisis in 2008. This led to Prva Banka delaying the honoring of MNSS payment orders between July 2008 and October 2009. In June 2009, Prva Banka, MNSS and ZN signed a refinancing protocol for the Bank, whereby the Bank would pay EUR 2.5 million to ZN's creditor (CVS) from **12.53**

Chapter 12 SERBIA AND MONTENEGRO

MNSS' CAPEX⁵⁰ account by 23 June 2009, but 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.

- 12.54** Later, in July 2009, the Montenegro government (the Respondent of the case) and MNSS agreed to a refinancing protocol and amending the original privation agreement. The Respondent agreed to provide a guarantee for a EUR 25 million loan to ZN by a commercial bank, including the guarantee of a EUR 3.5 million short-term loan, and to reduce MNSS' investment obligations for 2009 and 2010. MNSS agreed to grant a loan facility of EUR 10 million to ZN conditional on ZN obtaining such loan from a commercial bank. Later in July, ZN obtained such a short-term loan from BlueBay Multi-Strategy Investments, which was guaranteed by the Respondent. However, in 2009, ZN defaulted on this loan, forcing the Respondent to pay the outstanding amount. In relation to this, MNSS had earlier agreed with the Respondent to reimburse it, if BlueBay would call the guaranteee, or it would transfer 25% of its ZN shares. MNSS opted to do the latter, and in January 2010, MNSS transferred 25% of its ZN shares to the Respondent.

- 12.55** However, problems at ZN escalated further during 2010, as in autumn and later in December, the workers occupied the ZN's management building and even physically assaulted the Chief Executive Officer. This situation was further worsened by the difference of opinion between MNSS and the Respondent about how to handle ZN's worsening situation, as MNSS' proposals were rejected. Finally, the Respondent acquiesced to MNSS' wish to reduce the number of workers employed in the steel mill, if MNSS would make the agreed minimum investment in 2011. MNSS was only prepared to invest a much lower amount. In fact, the Respondent later informed MNSS that it was in breach of the original privatization agreement, because it failed to present the performance bond for 2011, and didn't pay the workers' salaries for several months. During 2011, ZN's situation further worsened by lack of cooperation between MNSS and Respondent, a strike by the workers, and finally a bankruptcy petition of ZN by the workers' unions (the Respondent provided financial aid to these unions). The petition was successful, and ZN was declared bankrupt, and its assets were sold in 2012 April.⁵¹

- 12.56** After analyzing the facts, let us move on to the actual proceedings of the case. The two Claimants, MN Specialty Steel Ltd. (MNSS) and Recupero Credito

50 Capital expenditure.

51 <http://investmentpolicyhub.unctad.org/ISDS/Details/494>, accessed 18 March 2018.

E. DETAILED AND IN-DEPTH ANALYSIS OF THE MONTENEGRIN CASE-LAW

Acciaio N.V (RCA), originally initiated two arbitration proceedings under the Additional Facility of ICSID, for breaches of the 2002 Netherlands-Yugoslavia BIT, and for breaches of the Montenegrin Foreign Investment Laws 2000 and 2011. However, the parties agreed to consolidate the two proceedings into one. As the first step of these consolidated proceedings, the Respondent raised six objections in total to the jurisdiction of the Tribunal. These were the following: 1) Tribunal lacks jurisdiction because of the express waiver of jurisdiction in the original privatization agreement; 2) lack of jurisdiction because the Respondent has not consented to the Additional Facility Arbitration in its two foreign investment laws; 3) the Dutch nationality of the Claimants has been fabricated while the present dispute had already arisen; 4) MNSS' shares of ZN, MNSS' loans to ZN and RCA's assigned loan from MNSS do not qualify as investments; 5) these alleged investments were not in accordance with host State law; and 6) the Claimants did not exhaust local remedies before turning to arbitration.

The Claimants responded by stating that as RCA was not part of the **12.57** privatization agreement, it could have not waived its rights. Furthermore, the relevant clause in itself was argued to be not a waiver of jurisdiction, and in fact, MNSS could not waive its rights under the BIT. They also disputed the interpretation of the 2000 and 2011 foreign investment laws. As to the accusation of being shell companies, the Claimants argued that they qualified as investors under the BIT, and that the Respondent was conflating the nationality of individuals with the nationality of corporations, which is contrary to the principles of international law. In relation to the fourth objection, the Claimants stated that their investment met the *Salini* test⁵² for defining a protected investment under the ICSID Convention, and that the definition of investment in the BIT is very broad. For the fifth objection, the Claimants pointed out that there is no requirement of legality under the BIT that would affect the exercise by the Tribunal of its jurisdiction. Furthermore, the Respondent had a long-standing acceptance of the Claimant's investments, which thus precludes the use of the legality requirement to defeat the Tribunal's jurisdiction. Finally, the Claimants noted that the sixth objection was not applicable, as 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, based on previous decisions.

⁵² *Salini* test, which defines an investment as having four elements: (1) a contribution of money or assets; (2) a certain duration; (3) an element of risk and; (4) a contribution to the economic development of the host state. See <http://chicagounbound.uchicago.edu/cjil/vol15/iss1/13/>, accessed 18 March 2018.

Chapter 12 SERBIA AND MONTENEGRO

- 12.58** Ultimately, the Tribunal rejected most of the Respondent's objections, but accepted that MNSS validly waived its rights under the BIT to pursue contractual claims. Furthermore, based on the correct translation of the domestic 2000 and 2011 foreign investment laws, the Tribunal also found that it had no jurisdiction under those laws.
- 12.59** In relation to the alleged breaches of the BIT, the following claims have been made by the Claimants:
- (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))⁵³
- 12.60** These allegations are based on the following actions and omissions of the Respondent: the Respondent's actions in relation to Prva Bank, its refusal to reduce the headcount, its funding of the labor union, its refusal to allow scrapping of old equipment, the bankruptcy proceedings of ZN, its refusal to allow a debt-equity swap, its refusal to consent to the financing of ZN, its refusal to allow withdrawals from ZN's special account, its forced evictions of ZN's management, the Respondent's breach of obligation to maintain a stable legal and business environment and its discrimination against MNSS.
- 12.61** The Tribunal made the following decisions on these claims. It stated that the Respondent failed to ensure the protection of persons and property, but it didn't grant any compensation, as the Claimants didn't manage to show they suffered damages as a result. The Tribunal also dismissed 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.
- 12.62** Furthermore, the Tribunal decided to dismiss all other claims on the merits, because they fall outside its jurisdiction. As for the costs, the Tribunal declared that each party shall pay for its own costs, and that the Claimants shall pay for the fees and expenses of the Tribunal and the ICSID Secretariat.

⁵³ p.77 of the Arbitration Award.

E. DETAILED AND IN-DEPTH ANALYSIS OF THE MONTENEGRIN CASE-LAW

3. *CEAC Holdings Limited v. Montenegro* (ICSID Case No. ARB148)

As before, the first element that must be discussed is the factual background. The Claimant of this case was CEAC Holdings Limited (hereafter: CEAC), a company incorporated under the laws of Cyprus. The case concerns an aluminum plant located in Montenegro, known as Kombinat Aluminijuma Podgorica, A.D. (hereafter: KAP). Originally, this plant was state-owned, but in 2003, the Montenegrin Government initiated a public tender process with the goal of privatizing it. This was accomplished when in 2005, Rusal Holdings Limited submitted a winning bid for the plant. CEAC was an affiliate company of Rusal, and thus it was the company that purchased KAP's shares. According to the agreement, CEAC paid EUR 48.5 million to acquire about 65% of the company's shares and also committed to invest EUR 75 million over a five-year period, for the dual purposes of improving KAP's facilities and implementing various social and environmental programs. Later in 2005, CEAC also designed to acquire a minority block of shares in Rudnici Boksita Nikšić, A.D. (hereafter: RBN), the company chiefly responsible for supplying the aluminum plant with raw materials, for EUR 6 million. To further ensure the profitability of KAP, CEAC decided to provide the plant with a dedicated source of electricity. This was accomplished by purchasing all the shares in the state-owned coal power plant, TE Pljevlja, and a 31% stake in the state-owned coal mine Rudnik Uglja. Despite these steps, CEAC began experiencing troubles in 2006, when the Claimant allegedly learned that the Montenegrin Government misled it about KAP and RBN during the tender process. Namely, the Government understated KAP's debts and obligations by tens of millions of euros. To further compound this revelation, the Montenegrin Parliament decided to terminate the privatization of TE Pljevlja and Rudnik Uglja, with scant reasoning. This severely compromised KAP's critical need for competitively-priced electricity. As a result of these issues, CEAC initiated arbitration against the Respondent (Montenegro) in 2007. This was discontinued in 2009, when the parties settled. As a result of the settlement, CEAC transferred 50% of its shares in KAP to the Montenegrin Government (giving it an equal stake), and a seat on KAP's board of directors. In exchange for this, Montenegro committed to subsidize KAP's electricity supply and issue EUR 135 million in state guarantees to KAP.

However, the relationship between CEAC and the Government further deteriorated, as CEAC alleged that its attempts to restructure and modernize the aluminum plant were frustrated by the Respondent, which supposedly undertook several actions aimed at causing the plant to default on its debts. These alleged actions included Montenegro refusing to provide KAP with the electricity subsidies that were promised in the settlement. To aggravate this,

Chapter 12 SERBIA AND MONTENEGRO

CEAC alleged that the state-owned electricity company actually reduced KAP's supply of electricity. Enhancing this alleged malignancy, CEAC also claimed that Montenegro's representative on the KAP board of directors refused to approve the plant's 2012 financial statements and its business plan, which approvals were conditions of a loan agreement between KAP and Deutsche Bank. Lastly, CEAC suggested that Montenegro refused to provide its written consent as guarantor under this loan agreement.

- 12.65** These events apparently led to KAP defaulting on its debt. In 2013, the Montenegrin Ministry of Finance commenced insolvency proceedings against KAP in the Commercial Court of Podgorica, and appointed an insolvency manager for the plant. The conduct of this manager was allegedly highly irregular. In particular, he had KAP enter into an agreement with a state-owned oil trading company. CEAC claimed that this enabled the Montenegrin Government to reap the benefit of the revenues associated with KAP's aluminum production. The insolvency manager subsequently announced a public tender for the sale of all of KAP's assets, without seeking the approval of the plant's Board of Creditors, which was supposedly responsible for major decisions in the bankruptcy proceedings. The value estimate provided by the insolvency manager, EUR 52 million, was alleged by CEAC to be far below the actual market value of the property.
- 12.66** Lastly, the Claimant also alleged that Montenegro attempted to intimidate CEAC by initiating criminal proceedings against the chief financial officer of CEAC and KAP, for stealing electricity. CEAC described this criminal proceeding as "absurd and unfounded," and when the case was brought to the ECHR, Montenegro promptly dismissed the local proceedings.
- 12.67** After the facts, let us continue with the actual proceedings. Based on the alleged misconduct described above, CEAC filed a case against Montenegro, based on the 2005 BIT between Montenegro and Cyprus, on March 20, 2014. CEAC claimed that Montenegro has breached several of its obligations under the BIT, including its obligation to provide fair and equal treatment; to provide full protection and security; to provide national and most-favored-nation treatment, including with respect to the "management, maintenance, use, enjoyment, expansion or disposal" of investments; to not expropriate, except in cases in which such measures are taken in the public interest, observe due process of law, are not discriminatory, and are accompanied by adequate compensation effected without delay; to guarantee the free transfer of payments and to "encourage and create stable, equitable, favourable and transparent conditions for [foreign investors] to make investments in its territory."

E. DETAILED AND IN-DEPTH ANALYSIS OF THE MONTENEGRIN CASE-LAW

However, before the merits of the case could have been debated, the issue of **12.68** “seat” arose. The arbitration tribunal decided to dedicate first phase of the proceedings to determining whether CEAC has a “seat” under Article 1(3)(b) of the BIT.⁵⁴ This would eventually grow into the central – and only – question of the proceedings.

In relation to this issue, CEAC’s position was that it has established a seat in **12.69** Cyprus, in accordance with the meaning of the BIT, and therefore qualifies as an investor under it. It alleged that the term “seat” cannot be interpreted autonomously under the BIT, but rather must be determined by *renvoi* to Cypriot municipal law. This is because the BIT itself does not determine the term “seat,” and there exists no uniformly accepted definition of the term under international law, thus *renvoi* is the only viable solution. And under Cypriot law, the “seat” is taken to mean “registered office,” and not “real seat.”⁵⁵ The Claimant reinforced this position by pointing out that the BIT was never intended to be interpreted as a self-contained treaty, as evidenced by Article 10, which places great importance on municipal law.

By contrast, the Respondent argued that the term “seat” should be interpreted **12.70** autonomously under the BIT, without *renvoi* to municipal law. It also stated that the term “seat” cannot be construed to mean incorporation and address. Furthermore, it argued that even under Cypriot law, the term “seat” requires more than incorporation and address.⁵⁶ It contended that “seat” is a practical concept, which requires a subject and an activity. Because a legal entity cannot think, form views or adopt decisions, it requires a representative. Where that representative resides, that is where the seat of the legal entity is situated. Montenegro further argued that regardless of interpretation, CEAC does not have a seat in Cyprus, as the alleged office located at that address does not have the substance required to qualify even as a registered office within the meaning of Cypriot law. It pointed out that when it attempted to courier a package to that address, three delivery attempts (two by DHL and one by FedEx) failed, and Respondent’s counsel was told that CEAC was “not known at that address.” Strangely, the arbitration tribunal determined that it was not necessary to determine the precise meaning of the term “seat,” because

⁵⁴ “The term ‘investor’ shall mean: ... b) a legal entity incorporated, constituted or otherwise duly organised according to the laws and regulations of one Contracting Party having its seat in the territory of that same Contracting Party and investing in the territory of the other Contracting Party.” <http://investmentpolicyhub.unctad.org/Download/TreatyFile/4738>, accessed 18 March 2018.

⁵⁵ Republic of Cyprus THE COMPANIES LAW “102.- (1) A company shall ... , have a registered office in the Republic to which all communications and notices may be addressed.” The law does not use the term “seat”. [www.olc.gov.cy/olc/olc.nsf/all/E1EAEB38A6DB4505C2257A70002A0BB9/\\$file/The%20Companies%20Law,%20Cap%20113.pdf?openelement](http://www.olc.gov.cy/olc/olc.nsf/all/E1EAEB38A6DB4505C2257A70002A0BB9/$file/The%20Companies%20Law,%20Cap%20113.pdf?openelement), accessed 18 March 2018.

⁵⁶ Interpreting the Cypriot Law, the authors agree with this contention.

Chapter 12 SERBIA AND MONTENEGRO

it found that there is no sufficient evidence that CEAC had a registered office in Cyprus at the relevant time, nor a conclusion that it was managed and controlled from Cyprus. As these two approaches were the only competing interpretations put forward by the parties, the arbitration tribunal came to the conclusion, in July 2016, that CEAC did not have a “seat” in Cyprus at the relevant time. Thus, CEAC is not an investor within the meaning of the BIT, and the arbitration tribunal has no jurisdiction to hear the case. As for the costs, it decided that CEAC shall bear the full costs and expenses incurred by ICSID in connection with the proceedings, including the fees and expenses of the members of the arbitration tribunal, and that it shall reimburse Montenegro its legal costs and expenses. In November 2016, CEAC filed an application for the annulment of the award. This proceeding is still pending at the moment.

F. CONCLUSIONS

- 12.71** In conclusion, we can state that a safe political and legal environment is a very important factor for investors. Investors will look for the same in Serbia or in Montenegro. While written guarantees – like laws, international agreements – are important, they are not enough. What makes these guarantees really valuable is their correct application. In this chapter, we have attempted to show both sides of the coin: written guarantees, and their application as well.
- 12.72** We can conclude, though it might sound as a common place, investment environment and investment protection standards are changing very fast in our globalizing World. Thus, in our opinion it is of crucial importance for Serbia and Montenegro to follow newest international trends in the field of investment protection constantly. Based on and in accordance with these trends, the revision of investment protection treaties and investment regulation is always necessary. Our impression is that the standard of foreign investment protection is constantly getting higher and higher.
- 12.73** It is very difficult to give a clear-cut answer to the question if these two countries meet these elevating standards. While both countries introduced recent regulations aimed at tackling the issue, the actual content of these laws do not really show a solid grasp of the evolving situation. The practical application of these laws is sometimes questionable, see for example *CEAC v. Montenegro* or *Mytilineos v. Serbia*.

F. CONCLUSIONS

In the end, we believe that legal protection alone without professional and efficient judicial practice is not enough. Therefore political stability, a perspicuous legal system, and an efficient judicial system can quicken the inflow of foreign capital to Serbia and Montenegro in our opinion. The future aim of both countries should be to adopt and apply these standards with as much haste as possible, even though these are exactly the type of values that come from decades-long traditions. The road ahead for both countries is hard, but not impossible. **12.74**