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MONTENEGRO'S INTERPLAY BETWEEN THE RULE OF LAW AND INVESTMENT PROTECTION

Summary

The rule of law plays a significant role in attracting and safeguarding investments, with particular importance in the areas of legal certainty and stability that investors expect and demand. Montenegro's efforts to strengthen the rule of law have been critical in creating a favorable environment for investment protection, especially as the country seeks to align itself with the standards of the European Union. Montenegro is a signatory to numerous Bilateral Investment Treaties (BITs) that provide protection for foreign investors, such as fair and equitable treatment, protection against expropriation and access to international arbitration. These treaties can be seen as Montenegro's commitment to upholding the rule of law in its dealings with foreign investors. However, Montenegro continues to struggle with judicial inefficiency, political interference and corruption, undermining the effectiveness of its legal framework and creating uncertainty around doing business in the country. This paper will analyze Montenegro's legal framework for the protection of foreign investments, emphasizing the key principles of the rule of law that underlie this protection. The analysis will focus on principles such as legal certainty and fair and equitable treatment, which are essential for creating a stable and predictable investment environment. In addition, the paper will examine ongoing disputes against Montenegro, highlighting cases in which the state has been accused of violating these fundamental principles, thereby calling into question the integrity of its legal commitments to foreign investors and their investments.

Keywords: *Rule of law; investment protection; investors; investments; Montenegro*

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Introduction

The importance of the rule of law in attracting foreign investments is well known. Strong legal framework, effective judicial processes, transparency, protection of fundamental human rights and freedoms, access to justice and legal certainty are just some of the rule of law principles that every investor seeks when making a decision to invest. Investors face a variety of risks in dealing with their investment in a foreign state, especially the political and so-called regulatory risks, such as a variety of state actions that can cause loss for foreign investments. For example, states can unexpectedly raise taxes, seize the investor's assets, outlaw the investment activity or impose new and unexpected regulatory conditions.[546] Therefore, it comes as no surprise that investors are drawn to countries where the rule of law is upheld.

Since Montenegro regained its independence in 2006, it has taken certain steps to strengthen its rule of law and create an attractive environment for foreign investment. Immediately after independence, Montenegro began work on joining the European Union, so in 2007 it signed the Stabilization and Association Agreement with the Union, and in 2012 it officially began negotiations to become a member state. Montenegro faced certain challenges along this path during the negotiations, especially in addressing the chapters on the rule of law, judiciary and fundamental rights (chapter 23) and justice, freedom and security (chapter 24). Nevertheless, Montenegro has been relatively successful in attracting foreign direct investment so far, especially in sectors like tourism, energy and real estate. In this regard, for almost four years, Montenegro has implemented the Program of acquiring economic citizenship based on investment, with the aim of attracting foreign investments and encouraging the economic and infrastructural development of the country. This program allowed foreign investors to obtain Montenegrin citizenship by fulfilling certain conditions and investing in approved projects.[547] However, due to certain concerns raised by the EU regarding

[546] Noah Rubins QC, Thomas-Nektarios Papanastasiou, N. Stephan Kinsella, *International Investment, Political Risk, and Dispute Resolution*, Ed. Loukas Mistelis, Oxford International Arbitration Series, Oxford University Press, 2020., 16.

[547] Decision on the criteria, method and procedure of selection of persons who can obtain Montenegro citizenship by admission for the implementation of a special investment program of special significance for the economic and economic interest of Montenegro, ("Official Gazette of Montenegro", No. 79 of December 7, 2018, 12/20, 143/21, 68/22).

money laundering, terrorist financing and organized crime, Montenegro suspended the implementation of this program in 2022.[548] Although this program brought Montenegro numerous financial benefits (estimated at around 300 million euros in investments and around 70 million euros to the state budget, from fees paid), the program was accompanied by numerous controversies and concerns regarding the lasting effects of granting economic citizenship to foreign investors.

Despite the various rule of law implications of this program that we can also discuss, the paper will further focus on those rule of law principles guaranteed to foreign investors in the Bilateral Investment Treaties (hereinafter: BITs) to which Montenegro is a party. Specifically, the paper will provide an overview of rule of law assessments in Montenegro, followed by a focus on investment disputes in which Montenegro faced allegations of violating key rule of law principles in its treatment of foreign investors and their investments. Notwithstanding that Montenegro has generally been successful in resolving these disputes, the analysis will serve to highlight the soft spots in Montenegro's approach to foreign investment, as well as to provide specific recommendations on how to strengthen the rule of law in the country in order to increase its attractiveness to foreign investors.

I The inextricable connection between investment law and the rule of law

The evolution of international investment law can be seen as an important achievement for the international rule of law. The establishment of investment protection through BITs and the judicialization of Investor-State Dispute Settlement (hereinafter: ISDS) have introduced structured rules and procedures, developing international rules and establishing means for the peaceful settlement of investment disputes.[549] Therefore, international

[548] Montenegro informed Brussels that it has abolished economic citizenship, *Radio Free Europe*, 2024., https://www.slobodnaevropa.org/a/crna-gora-ukinula-ekonomsko-dr%C5%BEavljanstvo/32265425.html, (20.11.2024).

[549] Stoll Peter-Tobias, *International Investment Law and the Rule of Law*, Goettingen Journal of International Law 9 (2018) 1, Special Ed. Holterhus, 267-292, 276; Damjanović Ivana, "The Reform of International Investment Law: Whose Rule of Law?", European Journal of Risk Regulation, *Cambridge University Press*, 2024., 1–17, 8.

investment treaties serve as one of the key tools for strengthening the rule of law in relationships between investors and states.[550]

This strengthening is evident in several dimensions. Firstly, the principles underpinning the rule of law are central to key aspects of investor protection, such as the fair and equitable treatment (hereinafter: FET) standard, safeguarding investors' legitimate expectations and protection against discrimination, among others. Additionally, some scholars argue that the principles supporting investor protection contribute to empowering individuals to stand up against a state, thereby reinforcing the rule of law more broadly.[551] Others suggest that the principles of international investment law also enhance the rule of law at the domestic level within individual countries.[552]

It is undisputable that some of the basic principles of the protection of foreign investors and investments represent the embodiment of the concept of the rule of law. This embodiment is most evident in the FET standard of protection of investments, as well as in safeguards against unjust or uncompensated expropriation.[553] Precisely, some authors recognize seven non-exclusive elements of the FET principle that can render the rule of law standard operable in the investment law practice. These are (1) the principle of legality; (2) administrative due process and the denial of justice; (3) the protection of legitimate expectations; (4) the requirement of stability, predictability and consistency regarding the legal framework; (5) non-discrimination; (6) transparency; and (7) the principles of reasonableness and proportionality.[554]

The principle of legality is a crucial element of the rule of law, requiring that the exercise of public authority follows established procedural and

[550] Schill Stephan W., *International Investment Law and the Rule of Law*, in Jeffrey Lowell, J. Christopher Thomas and Jan van Zyl Smit (eds.), Rule of Law Symposium 2014: The Importance of the Rule of Law in Promoting Development (Singapore: Academy Publishing, 2015), 81-102.
[551] Stoll Peter-Tobias, 277.
[552] Živković Velimir, „Investiciona arbitraža kao doprinos nacionalnog vladavini prava“, *Strani pravni život* 2/2016, 113-123; See also: Stoll Peter-Tobias, 278.
[553] Schill Stephan W., "Fair and Equitable Treatment, the Rule of Law, and Comparative Public" in Schill Stephan W. (ed), *International Investment Law and Comparative Public Law*, 2010, 151.
[554] Jacob Marc. & Schill S. W., „Fair and Equitable Treatment: Content, Practice, Method“, In: Bungenberg, M. et al (eds.). *International Investment Law: A Handbook*, Hart Publishing, 2017., 700-763, para. 40.

substantive rules, and that it is grounded in a legal foundation.[555] On one hand, the legality of international investment law is upheld through provisions in investment treaties (BITs) and ISDS mechanisms. On the other hand, regarding the FET standard, legality also entails an obligation for the host state to adhere to lawful practices in all its interactions with foreign investments and investors.

Administrative due process and denial of justice reflects the requirement to establish procedural rights for investors in administrative proceedings,[556] including elements such as timely decision-making, the right to be heard, impartiality of adjudicating authorities, and the provision of reasoned decisions. Administrative due process is intertwined with protection against arbitrary actions, and by upholding this principle, states not only adhere to their international obligations under investment treaties but also contribute to enhancing the rule of law.

The protection of legitimate expectations also plays a significant role in investment protection, as it is considered fundamental for an investor's decision to invest. The reasoning behind the investor's legitimate expectations is that it is commonly viewed as unjust for the host state to implement actions and changes that alter the certain expectations that the state made in its laws and regulations before the investment,[557] specifically the circumstances that led the investor to invest.[558] Frustration of investor's legitimate expectations generally implies some "change" in the regulations affecting the investment. Claims derived from the frustration of legitimate expectations of investors are

[555] Jacob Marc. & Schill, para. 42.
[556] *Ibid*., para. 49.
[557] However, there remains a key question regarding the nature of promises or commitments that limit a host state's authority to alter its legal framework to the detriment of investors. For instance, some decisions have held that only specific commitments made by a state to an investor can result in liability for subsequent changes to the legal framework. These decisions state that legitimate expectations do not demand that the host state refrain from modifying its legislation unless there has been an assumption of specific commitment to the investor, therefore, investor may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework. See: *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, para. 360; *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, para. 217.
[558] Dumberry Patrick, *A Guide to General Principles of Law in International Investment Arbitration*, Oxford International Arbitration Series, Oxford University Press, 2020., 324.

generally considered to develop in situations where the investor suffers losses due to changes made by the state.[559]

Legitimate expectations are viewed as creating an obligation for host states to uphold a stable legal and business environment.[560] This obligation necessitates that the authorities in the host country operate consistently, clearly, and transparently, ensuring that investors are well informed about the regulatory and administrative policies they will encounter. However, the consistency of international investment law has been a topic of intense discussion in recent years due to its interplay with other branches of international law, such as environmental law, human rights, and sustainable development, as well as trade law, labor rights and climate change commitments. This interrelationship is observed to challenge both the legal clarity and consistency of international investment law, which are integral to the broader concept of the rule of law.[561]

After all, stability and predictability are essential elements of a business environment, particularly for long-term investments, as they provide investors with the necessary consistency in the host country's legal framework. However, these principles pertain to the normal functioning and law-making development and should not be interpreted as an absolute requirement that would shield foreign investors entirely from regulatory changes in the host country.[562]

The protection against direct and indirect expropriation is also worth to mention, as it guarantees respect for property rights as a specific aspect of the rule of law and an essential prerequisite for the normal functioning on the market.[563] Direct expropriation occurs when a state takes ownership of an investment or implements measures explicitly aimed at depriving the investor of the value of its property. In contrast, indirect expropriation arises when the investor retains legal title to the investment, but state actions effectively deprive them of its economic use or benefit, rendering the investment

[559] UNCTAD, *Fair and Equitable Treatment*, UNCTAD Series on Issues in International Investment Agreements II, 2012., https://unctad.org/system/files/official-document/unctaddiaeia2011d5_en.pdf (12.07.2024), 64.
[560] *Techmed v. Mexico*, 2003; CMS v. Argentina, 2005.
[561] Stoll Peter-Tobias, 282; Damjanović Ivana, 6.
[562] Jacob Marc & Schill, para. 71.
[563] Schill Stephan W., 2015., 8.

functionally worthless or unviable.[564] Direct and indirect expropriation, when undertaken without adherence to the rule of law, such as lacking transparency, due process, or adequate compensation, violate fundamental principles of international investment law and undermine the legal protections afforded to investors.

Another fundamental principle at the core of investment protection, and thus a key feature of nearly all modern investment agreements, is the principle of non-discrimination.[565] Nevertheless, concerns have emerged that international investment law might lead to the discrimination of domestic investors at the national level. While it was originally designed to address the inadequate protection of foreign investors, the situation has shifted, and the added international safeguards for foreign investors now seem to risk creating unequal treatment, thereby calling into question the rule of law itself.[566]

Since investment treaties are the primary legal foundation governing the relationship between states and foreign investors, they are also recognized as vital tools for building a rule of law framework for investment relations.[567] This can also have its impact in countries with weak domestic legal systems,[568] where investment protection granted in an investment treaty can also contribute to the overall strengthening of the rule of law at the domestic level. Moreover, some argue that these treaties can benefit domestic investors and businesses as well. For instance, in cases where investment projects are carried out through joint ventures between foreign and domestic investors, the domestic investor may indirectly benefit from the protection granted to the foreign investor.[569] Nonetheless, these effects largely depend on the existing level of the rule of law in a given country. Given Montenegro's central focus in this paper, the following sections will examine the interrelation between the foreign investment climate and the state of the rule of law in Montenegro,

[564] Derains Yves, Sicard-Mirabal Josefa, *Introduction to Investor State Arbitration*, Chapter 5: Expropriation, Kluwer Law International 2018., 115-132; Bungenberg Marc, „(Direct and Indirect) Expropriation and the Rule of Law“, in *Investment Protection Standards and the Rule of Law*, August Reinisch (ed.), Stephan W. Schill (ed.), 2023., 61-80.
[565] Weiler Tod, "Saving Oscar Chin: Non-Discrimination in International Investment Law", in *International Law, Investment Law and Arbitration*, 2005., 557.
[566] This particularly stands for the procedural side of investor-state dispute settlement, given that foreign investors have more procedural options than domestic investors for challenging host state measures (e.g. ICSID). Stoll Peter-Tobias, 287-288.
[567] Schill Stephan W., 2015., 81.
[568] Stoll Peter-Tobias, 279.
[569] Schill Stephan W., 2015., 7.

highlighting key weaknesses that have emerged in some of the notable disputes.

II The Rule of Law in Montenegro: On the EU Horizon

The Montenegrin Constitution of 2007 stipulates that Montenegro is a state based on the principle of the rule of law.[570] As astutely observed by some scholars, while the rule of law naturally requires a constitution, it is not enforced by it, but it stands as a value or concept that includes the principles of legality, judicial independence and other elements which are reflecting the rule of law principle.[571] Therefore, constitutions can only serve their purpose in a society where the rule of law principles prevails. At its core, the rule of law requires not only formal legality, or a narrow conception of the rule of law, but also the idea that the state and its officials must act within a limiting framework of the law.[572] Many of the principles discussed in the previous section, which embody the rule of law, are reflected in Montenegro's bilateral agreements with other countries. However, the influence of national law and the actions of domestic institutions are unavoidable in implementing certain aspects of the rule of law, which also impact foreign investors and their business activities related to investments in Montenegro. Therefore, it is useful to consider general assessments regarding the rule of law in Montenegro. In this context, the European Commission's annual reports on Montenegro serve as an authoritative source, given the country's active efforts to become the next EU member state.[573]

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[570] Constitution of Montenegro, ("Official Gazette of Montenegro", no. 1/2007 and 38/2013 - Amendments I-XVI), Art. 1.

[571] Astrid Lorenz, "Constitutions and the rule of law", in Adrian Vatter & Rahel Freiburghaus (ed.), Handbook of comparative political institutions, Edward Elgar Publishing, 2024., 362-377, 362.

[572] Du Ming, „International Investment Law and the Rule of Law: The Case of China“, Washington International Law Journal Vol. 33/2, 2024., 314-344, 322.

[573] Montenegro's negotiations for accession to the European Union have been ongoing for over 12 years, with 33 chapters opened and 3 chapters closed so far. In February 2020, Montenegro adopted a new negotiation methodology under which no chapter can be temporarily closed until the Interim Benchmark Assessment Report (IBAR) is received. A positive IBAR indicates that the country has made progress in the areas of the rule of law and the judiciary and is prepared for the next phase of alignment with EU standards. Following a positive IBAR, the country receives final benchmarks from the European Commission, with chapters 23 and 24 closing last upon meeting those benchmarks. See: What is IBAR and why is it important for Montenegro?, *ME4EU*, 2024., https://www.eu.me/sta-je-ibar-i-zbog-cega-je-vazan-za-crnu-goru/ (19.11.2024).

The European Commission's 2024 Report on Montenegro assessed that the country remains moderately prepared to implement the EU acquis and meet European standards in the area of the rule of law and fundamental rights. Report states that Montenegro has made a good progress overall, which is an improvement compared to 2023 Report with overall progress being described as limited.[574] The Report highlights that Montenegro has made good progress on key judicial reforms and recommendations from last year, when no progress was recorded in judicial reform. In 2023 EU Commission stated that the Montenegrin judicial system is facing a deep institutional crisis marked by weak leadership, poor planning, and lack of strategic vision, all of which undermine its ability to deliver justice effectively. The 2024 Report acknowledges some overall progress but emphasizes that the quality of justice still "needs to be improved", while the efficiency of justice "needs to be significantly improved."[575] This is particularly due to the substantial backlog of cases pending before the courts. By the end of 2023, the number of cases older than three years had risen by 20% and the average disposition in 2023 increased to 309 days.

While in 2023 EU Commission assessed that Montenegro has achieved some preparation but limited progress in the fight against corruption, in 2024 EU Commission states that Montenegro is between having some level of preparation and a moderate level of preparation in the fight against corruption. This aligns with the 2023 assessment, where the Commission noted that corruption remains widespread, especially in state structures.[576] However, most of the Commission's recommendations from 2023 were implemented, indicating that Montenegro is making efforts to strengthen its fight against corruption.

The Commission once again emphasized that the judiciary and prosecution remain perceived as vulnerable to political interference, which could undermine public trust in the judicial system.[577] In 2023, this was primarily attributed to an insufficient rule of law culture in relevant institutions and to shortcomings in the relevant legislation.[578] Based on these

[574] Montenegro 2023 Report, EU Commission, Brussels, 8.11.2023., 21; Montenegro 2024 Report, EU Commission, Brussels, 30.10.2024., 5.
[575] Montenegro 2024 Report, 29-30.
[576] Montenegro 2023 Report, 5.
[577] Montenegro 2024 Report, 28.
[578] Montenegro 2023 Report, 24.

factors, it is clear that Montenegro still has work to do to strengthen the rule of law and enhance its appeal to foreign investors. Since 2006, when Montenegro regained its independence, it has focused on attracting foreign direct investment, with the majority of inflows today concentrated in sectors like tourism, real estate, energy, telecommunications, banking, and construction. Data from the Central Bank of Montenegro shows that between 2006 and the end of 2023, foreign direct investment in the country totaled 13.8 billion euros, with 4.38 billion euros recorded between 2019 and 2023 alone.[579]

In terms of bilateral investment cooperation, Montenegro currently has 24 bilateral investment treaties (BITs) in force, 15 of which are with EU Member States.[580] However, many of these BITs were inherited as a successor state from its time as part of the Socialist Federal Republic of Yugoslavia and later the Federal Republic of Yugoslavia. As a result, these treaties contain outdated provisions and standards that require revision and adaptation to align with modern practices. As an official candidate for EU membership, Montenegro is actively pursuing substantial reforms to align its legal framework with EU standards, particularly in areas such as the investment climate and protection of foreign investors. The EU Commission acknowledged that Montenegro has shown a solid level of preparation and made progress in regional cooperation.[581] However, this year's EU Report did not address specific investment policies Montenegro should adopt to enhance its appeal to foreign investors, instead reiterating the general recommendations from 2023.

Nevertheless, Montenegro still faces numerous challenges in managing foreign investments, including unfinished projects and difficulties in meeting its previous commitments as a host country. As a result, Montenegro faced numerous accusations of violating some of the key principles of investment protection, which are regarded as fundamental to the rule of law. In dealing with these accusations, Montenegro was part of several concluded disputes,[582]

[579] Bulletin of Central Bank of Montenegro, 2024, https://www.cbcg.me/ (23.10.2024).
[580] Montenegro 2023 Report, 131.
[581] Montenegro 2024 Report, 19.
[582] For example: *Addiko Bank AG v. Montenegro*, ICSID Case No. ARB/17/35; *Oleg Vladimirovich Deripaska v. the State of Montenegro*, PCA Case No. 2017-07; *CEAC Holdings Limited v. Montenegro*, ICSID Case No. ARB/14/8; *MNSS B.V. and Recupero Credito Acciaio N.V v. Montenegro*, ICSID Case No. ARB(AF)/12/8; *Medusa (Montenegro) Limited v. Montenegro*, PCA Case No. 2015-39.

while some of them are currently ongoing[583] and some have been announced, but not officially launched.[584] In nearly all of these disputes, foreign investors raised issues related to key rule of law principles, such as the FET principle, which is seen as an embodiment of rule of law in investment protection.[585] In the following section, we will examine these disputes and the questions they raised. We will present the arguments made by foreign investors and explore how investment tribunals addressed these points, offering a clear understanding of potential weak spots in Montenegro's dealings with foreign investments. Finally, we will provide key recommendations on how to strengthen both the rule of law and investment relations with foreign investors.

III Did Montenegro violate rule of law principles in its treatment of foreign investors?

Several investment cases against Montenegro have involved discussions on key principles that are integral to the rule of law. In *Addiko Bank AG v. Montenegro* (2021) tribunal examined whether there has been a breach of the principles of due process[586] and good faith[587] when Montenegrin Parliament adopted the "Law on Conversion of Swiss Franc Denominated Loans into Euro Denominated Loans," following the Swiss central bank's decision to eliminate an exchange rate control mechanism. This move caused the Swiss franc to surge in value against the euro, resulting in borrowers having to repay their loans at significantly higher rates. Addiko was obligated to refund

[583] For example: „Atlas Group and Duško Knežević v. Montenegro“ (Further detail still not available), *Global Arbitration Review*, 2024., https://globalarbitrationreview.com/article/banker-makes-good-threat-against-montenegro (15.11.2024); Susannah Moody, „Montenegro faces claim over unbuilt Ritz-Carlton“, *Global Arbitration Review*, 2024., https://globalarbitrationreview.com/article/montenegro-faces-claim-over-unbuilt-ritz-carlton (15.11.2024); "Pauza u arbitraži: Adriatic Properties otvara “Sveti Stefan” na tri mjeseca", *Investitor*, 2024., https://investitor.me/2024/05/30/pauza-u-arbitrazi-adriatic-properties-otvara-sveti-stefan-na-tri-mjeseca (15.11.2024).

[584] „Maljevik bi mogao završiti na arbitraži“, *Vijesti Online*, 2024., https://www.vijesti.me/vijesti/ekonomija/716688/maljevik-bi-mogao-zavrsiti-na-arbitrazi (15.11.2024).

[585] Živković Velimir, *Fair and Equitable Treatment and the Rule of Law*, Elgar International Investment Law series, Elgar Publishing, 2023; Damjanović Ivana, 8.

[586] Addiko claimed that Montenegro violated the principle of due process by adopting the Abbreviated Procedure in passing the Law on Conversion and its Amendment.

[587] Addiko claimed that Montenegro's actions were not in good faith because it introduced the Law on Conversion and its Amendment using public interest “as a pretext” to favour a small group of its citizens and to single out Addiko for unfavourable treatment.

money to borrowers without applying interest on the converted loans and reportedly incurred costs of 10 million euros for converting loans that had already been repaid. Addiko argued that this Law violated the Austria-Montenegro BIT[588] by causing significant financial harm to its investment in Montenegro, as well as that the Law constituted unfair and inequitable treatment and amounted to an indirect expropriation of its assets.

The Tribunal in the Addiko case highlighted that there is a need for the process to be "manifestly unfair or unreasonable", to demonstrate "a complete lack of transparency and candour" or to "surprise a sense of judicial propriety" for there to be a due process violation. Therefore, minor procedural irregularities will not amount to a violation of the due process principle as long as the principles of natural justice were respected and actions were taken in a transparent manner.[589] In providing this conclusion, the tribunal relied on the reasonings from *AES v. Hungary*, *Waste Management (II) v. Mexico* and *Adel a Hamid Al Tamimi v. Oman*,[590] which contained almost the same statements. Tribunal concluded that there was no breach of due process because it has not been shown that the procedure adopted was "manifestly unfair or unreasonable" or lacking transparency and candour.[591]

With respect to good faith, the tribunal indicated that in order to prove a violation of the standard of good faith, it must be shown that the State "conspired" to inflict damage on an investment or used a legal instrument "for purposes other than those for which it was created or engaged in comparable conduct." It has also pointed out that it is a general principle of international law that "good faith is to be presumed, whilst an abuse of right is not."[592] In reviewing the relevant facts, the tribunal concluded that Adikko did not provide adequate evidence to show *mala fide* on part of Montenegro and that

[588] Agreement between the Government of the Republic of Austria and the Federal Government of the Federal Republic of Yugoslavia for the Reciprocal Promotion and Protection of Investments, signed on 12 October 2001 and entered into force on 1 August 2002.
[589] Addiko award, 160-161.
[590] *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary* (II), ICSID Case No. ARB/07/22; *Waste Management v. United Mexican States* (II), ICSID Case No. ARB(AF)/00/3; *Adel a Hamid Al Tamimi v. Oman*, ICSID Case No. ARB/11/33.
[591] Addiko award, 164.
[592] Cheng Bin, *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge University Press, 2006., 305.

the legislative intent in the present case was only to protect the CHF Loan holders, and not to punish the Addiko Bank, as presented by the investor.[593]

The tribunal in this case further examined whether legitimate expectations of Addiko bank as an investor were frustrated. In doing so, the tribunal firstly underlined that an investor's legitimate expectations are generally created by specific undertakings and representations made by a host state to the investor. However, the tribunal did not determine that they were present in this particular case. Moreover, the tribunal did not find that Montenegro had given any implicit assurances to Addiko that it could have taken into account at the time of the investment.[594] Therefore, Addiko lost the argument that Montenegrin Law on Conversion and its Amendment frustrated its legitimate expectations.

Addiko also claimed that the Law on Conversion and its Amendment was discriminatory because it treated Swiss Franc Loans differently from Euro-denominated loans. Additionally, that such discrimination was contrary to the protection provided to its investment under the FET clause in the relevant Montenegro-Austria BIT.[595] However, the tribunal declined this argument stating that Euro-denominated loans cannot be accepted as a valid comparator to the Swiss Frans Loans.[596] The tribunal relied on the reasonings in *Crystallex v. Venezuela* and *Electrabel v. Hungary*,[597] concluding that Addiko failed to establish a materially similar comparator, which justifies the tribunal's decision to dismiss the discrimination claim. Particularly, given that Addiko has not submitted sufficient factual evidence to support the allegation or targeted discrimination.

Montenegro avoided serious allegations of breach of obligations under the Cyprus-Montenegro BIT[598] in the case of *CEAC Holdings Limited v. Montenegro* (2016),[599] where the Tribunal faced difficulties in qualifying

[593] Addiko award, 171.
[594] Addiko award, 176.
[595] *Ibid*., 184.
[596] The tribunal explained that the Swiss Franc Loans were more expensive, as they had to be repaid in Euros, which was not the case with the Euro-denominated loans, which were not affected by the sharp changes caused by the conversion.
[597] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2.
[598] Agreement between the Republic of Cyprus and Serbia and Montenegro on the Reciprocal Promotion and Protection of Investments, which entered into force on 23 December 2005.
[599] *CEAC Holdings Limited v. Montenegro*, ICSID Case No. ARB/14/8.

CEAC as an investor under the BIT.[600] CEAC submitted that Montenegro failed to provide fair and equitable treatment, full protection and security and national and most-favored-nation treatment to the investment, also violating the Art. 5 of the relevant BIT, which stipulated the obligation *not to 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*.[601]

The dispute centers on CEAC's investment in Montenegro's "Kombinat Aluminijuma Podgorica" (KAP), an aluminum plant privatized in 2005. CEAC alleges that Montenegro provided misleading financial information during the tender process, failed to fulfill commitments under a subsequent settlement agreement, and took actions that undermined KAP's financial viability, ultimately leading to the state's seizure of CEAC's investment. These actions included withholding electricity subsidies, obstructing loan agreements, and mismanaging insolvency proceedings to benefit state-owned entities. CEAC claimed that these measures amount to expropriation and a breach of Montenegro's obligations under international investment law.[602] However, these allegations never reached a final resolution, as the tribunal only discussed jurisdictional matters and rendered a decision that it lacks jurisdiction to hear the case, because CEAC is not an investor in the sense of the relevant treaty.[603] Nevertheless, these allegations have raised some

[600] The tribunal failed to qualify CEAC as an "investor" primarily due to issues surrounding CEAC's nationality and its failure to demonstrate a genuine connection to its alleged home state - Cyprus. CEAC was incorporated in Cyprus, but the tribunal did not found evidence supporting that CEAC had a registered office in Cyprus at the relevant time, nor that CEAC was managed and controlled from Cyprus. As CEAC did not have an effective connection to Cyprus, the tribunal emphasized that formal incorporation alone was not sufficient to establish jurisdiction.

[601] CEAC Award, 13.

[602] Most Montenegrin BITs protect investors from both direct and indirect expropriation. The majority of BITs cover expropriation, nationalisation and measures having effect equivalent to expropriation and nationalisation, while some refer to "measures having the same effect" for the indirect expropriation measures. In any case, there are four criteria for lawful expropriation: 1) conducted in public interest; 2) following a due process of law; 3) on a non-discriminatory basis and 4) with payment of compensation. See: Slaven Moravčević, Jelena Bezarevic Pajic, Vanja Tica and Vasilije Grgurević Schoenherr, Investment Treaty Arbitration: Montenegro, *Global Arbitration Review*, https://globalarbitrationreview.com/insight/know-how/investment-treaty-arbitration/report/montenegro (19.11.2024.)

[603] CEAC Award, 67.

concerns about Montenegro's adherence to rule of law principles in the investment protection it provides to foreign investors.

Moreover, Montenegro has been challenged over unlawful expropriation also in *MNSS v. Montenegro case (2016).*[604] In this case, Dutch companies claimed that Montenegro 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 considered to be entitled under the Montenegro-Netherlands BIT.[605] In the present case, Dutch companies MNSS B.V. and Recupero Credito Acciaio N.V. invested in the steel plant "Željezara Nikšić" in Montenegro through the privatization process. The investors, however, alleged that Montenegro had misrepresented the plant's financial health and operational condition, asserting that it was in much worse shape than presented. Subsequent financial difficulties resulted in bankruptcy proceedings, with the investors claiming that Montenegro's misrepresentation, improper interference, and mismanagement of the bankruptcy process harmed their investment and violated the FET standard under the Montenegro-Netherlands BIT.

On the other hand, the investors claimed that their investment was directly expropriated through the bankruptcy proceedings of "Željezara Nikšić" and the sale of its assets to "Toščelik." However, the tribunal found that most of the acts at the base of investor's claim were those of the bankruptcy administrator and not Montenegro as the host state, therefore, that these actions cannot be attributed to Montenegro. Part of investor's claim was based on the fact that direct expropriation occurred when the Commercial Court in Podgorica rejected the Reorganization Plan of the plant, which was later upheld by the Montenegrin Court of Appeal. Namely, the investor pointed out that these courts had relied in part on an expert report given by expert who is affiliated with the Government. Nevertheless, the tribunal decided that a court decision could not be considered a direct expropriation unless a denial of justice is found, which was not the case here.[606]

[604] *MNSS B.V. and Recupero Credito Acciaio N.V v. Montenegro*, ICSID Case No. ARB(AF)/12/8.
[605] Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Federal Republic of Yugoslavia, dated 29 January 2002.
[606] MNSS Award, 126-127.

Further, the tribunal in the present case found that Montenegro's overall conduct did not amount to a breach of the FET standard, as claimed by the investors. The investors alleged that Montenegro violated the FET principle by failing to prevent the management evictions at Željezara Nikšić, facilitating the plant's bankruptcy, failing to provide a secure environment and to act consistently with all its obligations under the BIT.[607] Additionally, the claims included failures in regulatory oversight by Montenegro and the Central Bank concerning Prva Banka,[608] conspiracy with the Worker's Union to bankrupt the company, and interference with the management of the plant.

In sum, the tribunal found that, rather than refusing to assist MNSS, the Government and Central Bank provided limited but non-discriminatory support to the Prva banka, which benefited MNSS, Željezara Nikšić, and other customers. The tribunal highlighted that this limited assistance was not tailored to MNSS's needs and ultimately proved insufficient. However, it also highlighted that MNSS had no right to special assistance from the Central Bank or the Montenegrin Government. Additionally, the tribunal determined that the Government's actions during the plant's financial difficulties were not unfair or inequitable, given the broader economic context. In the end, the tribunal determined that there was no breach of the FET obligation.

IV In conclusion

A silver lining in the series of investment disputes raised against Montenegro is the successful resolution of these cases in Montenegro's favor. At least for now, as some upcoming disputes have yet to be resolved by tribunals. To date, Montenegro has narrowly managed to win cases, by having tribunals declare lack of jurisdiction or that Montenegro has not undertaken specific obligations the investor could rely on to claim frustration of its legitimate expectations. However, since there are still at least a few conflicts to resolve, Montenegro should remain vigilant and continue its work on

[607] *Ibid*., 97.

[608] The investors used Prva Bank for banking transactions related to their investments. However, Prva Banka failed to execute its payment orders in a timely and efficient manner, as it had suffered a liquidity crisis since 2007, which became increasingly severe as the financial crisis of 2008 developed. The investors alleged that Montenegro had violated the FET standard due to inadequate regulatory oversight by the Central Bank of Montenegro (the governing body). Furthermore, the investors alleged that the Montenegrin Government and the Central Bank obstructed transfers and refused to assist investors, doing so in an unreasonable and discriminatory manner.

improving investment climate in the country. This is not only to prevent disputes, but also to attract new investors, especially after its upcoming EU membership. And among the key indicators of a favorable investment climate is a well-organized state that upholds the rule of law. Montenegro is considered a country with enormous potential to become a leading star in attracting foreign investments, especially in the tourism and hospitality sectors, as well as energy and real estate. However, this would have little value if Montenegro were to spend its resources and time on costly arbitration proceedings, potentially resulting in significant damages. Consequently, its rule of law must be substantially evident from the functioning of all institutions and procedures undertaken. In order to strengthen the rule of law, Montenegro should adopt clear and predictable laws that will be enacted in a transparent manner and implemented on a non-discriminatory basis. Judicial independence and anti-corruption measures are two cornerstones for a more robust rule of law in Montenegro. In dealing with foreign investors, bilateral investment treaties are of utmost importance, and therefore Montenegro needs to give a fresh look to its mostly long-established BITs. Since the EU membership is one of the country's priorities, Montenegro should follow and would have to follow the best EU practices in terms of the treatment of foreign investments and the resolution of arising disputes.

mr Nikolina TOMOVIĆ*

MEĐUSOBNI ODNOS IZMEĐU VLADAVINE PRAVA I ZAŠTITE INVESTICIJA U CRNOJ GORI

Sažetak

Vladavina prava igra značajnu ulogu u privlačenju i zaštiti investicija, sa posebnim značajem u oblastima pravne sigurnosti i stabilnosti koje investitori očekuju i zahtijevaju. Napori Crne Gore u jačanju vladavine prava su bili od ključnog značaja za stvaranje povoljnog ambijenta za zaštitu investicija, posebno imajući u vidu težnju usklađivanja sa standardima Evropske unije. Crna Gora je potpisnica brojnih bilateralnih investicionih sporazuma (BIS) koji obezbjeđuju zaštitu stranih investitora, kao što su fer i pravičan tretman, zaštita od eksproprijacije i pristup međunarodnoj arbitraži. Ovi sporazumi se mogu posmatrati kao posvećenost Crne Gore dosljednom sprovođenju vladavine prava u odnosima sa stranim investitorima. Međutim, Crna Gora se i dalje suočava sa određenim poteškoćama u vidu neefikasnosti pravosuđa, političkog uplitanja i korupcije, što podriva učinkovitost njenog pravnog okvira i kreira neizvjesnost poslovnih aktivnosti u zemlji. U ovom radu biće analiziran crnogorski pravni okvir za zaštitu stranih investicija, naglašavajući ključne principe vladavine prava koji se nalaze u osnovi ove zaštite. Analiza će se fokusirati na principe kao što su pravna sigurnost i fer i pravičan tretman, a koji su od suštinskog značaja za stvaranje stabilnog i predvidljivog investicionog ambijenta. Pored toga, rad će analizirati aktuelne sporove protiv Crne Gore, ističući slučajeve u kojima je država optužena za kršenje osnovnih principa vladavine prava, a što je dovelo u pitanje i integritet njenih pravnih obaveza prema stranim investitorima i njihovim ulaganjima.

Ključne riječi: *Vladavina prava; zaštita investicija; investitori; investicije; Crna Gora*

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