INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

CEAC HOLDINGS LIMITED

(*Claimant*)

v.

MONTENEGRO

(*Respondent*)

(ICSID Case No. ARB/14/8)

AWARD

Members of the Tribunal
Professor Bernard Hanotiau, President
Professor William W. Park, Arbitrator
Professor Brigitte Stern, Arbitrator

Secretary of the Tribunal
Ms. Lindsay Gastrell

Assistant to the Tribunal
Ms. Iuliana Iancu

Date of Dispatch to the Parties: 26 July 2016

REPRESENTATION OF THE PARTIES

Representing Claimant

Mr. Egishe Dzhazoyan
Mr. Thomas Sprange, QC
Ms. Sarah Vasani
Mr. Grigori Lazarev
Mr. Benjamin Burnham
King & Spalding International LLP
125 Old Broad Street
London EC2N 1AR
United Kingdom

Representing Respondent

Mr. Christoph Lindinger
Mr. Slaven Moravčević
Ms. Anne-Karin Grill
Ms. Jelena Bezarević Pajić
Ms. Tanja Šumar
Mr. Michael Stimakovits
Schönherr Rechtsanwälte GmbH
Schottenring 19,
1010 Vienna
Austria

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I. INTRODUCTION AND PARTIES

1. The present dispute has been submitted to arbitration under the auspices of the International Centre for Settlement of Investment Disputes ("ICSID") on the basis of the 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 (the "BIT", the "Treaty")[1], and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the "ICSID Convention").

2. Claimant is CEAC Holdings Limited ("CEAC", "Claimant"), a company incorporated under the laws of the Republic of Cyprus ("Cyprus"). CEAC is represented in these proceedings by Mr. Egishe Dzhazoyan, Mr. Tom K. Sprange, QC, Ms. Sarah Z. Vasani, Mr. Grigori Lazarev and Mr. Benjamin Burnham of King & Spalding International LLP.

3. Respondent is Montenegro ("Montenegro", "Respondent"), an ICSID Contracting State since 10 May 2013. Montenegro is represented in these proceedings by Mr. Christoph Lindinger, Mr. Slaven Moravčević, Ms. Anne-Karin Grill, Ms. Jelena Bezarević Pajić, Ms. Tanja Šumar and Mr. Michael Stimakovits of Schönherr Rechtsanwälte GmbH.

II. PROCEDURE

4. On 11 March 2014, Claimant filed a request for arbitration dated 7 March 2014 (the "Request for Arbitration") with ICSID.

5. In accordance with Article 36 of the ICSID Convention, on 20 March 2014, the Secretary-General of ICSID (the "Secretary-General") registered the Request for Arbitration, as supplemented by Claimant's letter of 18 March 2014, and so notified the Parties.

6. In accordance with the Parties' agreed method of constituting the Tribunal, the Tribunal is composed of: Professor Bernard Hanotiau, a national of Belgium, as the presiding arbitrator;

[1] Exhibit CLA-1.

Professor William P. Park, a national of Switzerland and the United States, appointed by Claimant; and Professor Brigitte Stern, a national of France, appointed by Respondent.

7. On 14 July 2014, in accordance with ICSID Arbitration Rule 6(1), the Secretary-General notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Lindsay Gastrell, ICSID Legal Counsel, was designated to serve as the Secretary of the Tribunal.

8. On 12 August 2014, Respondent submitted Preliminary Objections Pursuant to Rule 41(5) of the ICSID Arbitration Rules (the "Preliminary Objections"), together with accompanying factual and legal exhibits.

9. On 10 September 2014, the Tribunal held the first session by telephone conference and subsequently issued Procedural Order No. 1 on 17 September 2014, setting out the procedure of the arbitration. The Tribunal also confirmed the Parties' agreement that Ms. Iuliana Iancu act as Assistant to the Tribunal. The Parties subsequently filed written submissions with regard to the Preliminary Objections and a hearing on the Preliminary Objections was held at the International Dispute Resolution Center in London on 11 December 2014.

10. On 27 January 2015, the Tribunal issued its Decision on Respondent's Objections under Rule 41(5) of the ICSID Arbitration Rules. The Tribunal dismissed Respondent's Preliminary Objections and decided to have a phase of the proceedings dedicated to determining whether Claimant has a "seat" under Article 1(3)(b) of the BIT. The Parties were invited to agree on a procedural calendar to this effect.

11. On 16 February 2015, each Party submitted its comments and proposals regarding a procedural calendar dedicated to the determination of the issue of the "seat".

12. On 2 March 2015, the Tribunal issued Procedural Order No. 2, wherein it set the procedural calendar and instructed the Parties to submit "with their written pleadings all evidence and arguments that pertain to the issue of the 'seat', in particular the definition, scope and content of the term 'seat' as used in the [BIT]".

13. On 9 March 2015, ICSID communicated to the Parties the Tribunal's proposal to hold the hearing on the issue of "seat" on 22-23 March 2016 in Paris. The Parties confirmed their agreement with the Tribunal's proposal on the same day.

14. On 3 April 2015, the Parties proposed a revised procedural calendar, which the Tribunal adopted.

15. On 7 April 2015, Arbitrator Stern made a supplemental disclosure concerning her appointment in *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro* (ICSID Case No. ARB(AF)/12/8).

16. On 22 April 2015, Claimant filed a Challenge to Professor Brigitte Stern as Arbitrator, pursuant to Article 57 of the ICSID Convention and Arbitration Rule 9. By letter of the same day, ICSID notified the Parties and the Tribunal that, pursuant to ICSID Arbitration Rule 9(6), the proceedings were suspended until a decision on the disqualification proposal would be taken.

17. On 23 April 2015, ICSID communicated to the Parties the calendar for written submissions on Claimant's request for disqualification.

18. On 24 April 2015, Arbitrators Hanotiau and Park acting as Deciding Co-Arbitrators approved Respondent's request for an extension of the deadline to file a reply to Claimant's request for disqualification and amended the procedural calendar accordingly.

19. On 26 May 2015, the Deciding Co-Arbitrators notified the Secretary-General that, after having carefully examined the request for disqualification, Arbitrator Stern's explanations, as well as the other submissions and exhibits filed in this respect, they were equally divided on the matter and had failed to reach a decision. The Deciding Co-Arbitrators requested that the Secretary-General notify the Chairman of the Administrative Council of ICSID accordingly, pursuant to Article 58 of the ICSID Convention and ICSID Arbitration Rule 9.

20. On 12 June 2015, the Chairman of the Administrative Council of ICSID rejected Claimant's Challenge to Professor Brigitte Stern as Arbitrator.

21. On 15 June 2015, the Tribunal took note of the fact that the proceedings could resume and invited the Parties to confer and agree on the procedural calendar.

22. On 16 June 2015, the Parties confirmed that the procedural calendar previously established would remain intact. On the same day, Claimant filed its Memorial on the Interpretation of Seat under Article 1(3)(b) of the Treaty (the "Memorial"), together with the expert testimonies of Dr. Monique Sasson ("Sasson First Legal Opinion") and Mr. Alecos Markides ("Markides First Legal Opinion"), factual exhibits and legal authorities.

23. On 30 September 2015, Respondent filed its Counter-Memorial on the Issue of "Seat" (the "Counter-Memorial"), accompanied by the expert witness reports of Prof. Vuk Radovic ("Radovic Legal Opinion") and Mr. Kypros Ioannides ("Ioannides First Legal Opinion"), the witness statement of Mr. Marcos Georgios Dracos ("Dracos Witness Statement"), and legal authorities.

24. On 15 November 2015, Claimant filed its Reply Memorial on the Issue of "Seat" (the "Reply"), accompanied by the second witness testimony of Dr. Monique Sasson ("Sasson Second Legal Opinion"), the second expert testimony of Mr. Alecos Markides ("Markides Second Legal Opinion"), the witness statement of Mr. Georgios Iacovou ("Iacovou Witness Statement"), factual exhibits and legal authorities.

25. On 31 December 2015, Respondent filed its Rejoinder on the Issue of "Seat" (the "Rejoinder"), together with the second expert witness report of Mr. Kypros Ioannides ("Ioannides Second Legal Opinion"), the witness statement of Mr. Michalis Georgiou ("Georgiou Witness Statement"), factual exhibits and legal authorities.

26. The hearing on the issue of "seat" was held at the World Bank Conference Centre in Paris on 22-23 March 2016. In addition to the Members of the Tribunal, the Secretary of the Tribunal and the Assistant to the Tribunal, the following persons participated at the hearing:

<u>On behalf of CEAC</u>

Mr. Egishe Dzhazoyan, King & Spalding International LLP
Mr. Thomas Sprange, King & Spalding International LLP

Ms. Sarah Vasani, King & Spalding International LLP
Mr. Grigori Lazarev, King & Spalding International LLP
Mr. Ben Burnham, King & Spalding International LLP
Ms. Lisa Wong, King & Spalding International LLP
Mr. Andrey Kovalenko, Deputy General Counsel, CEAC
Mr. Nicos Chrysanthou, Chrysanthou & Chrysanthou LLC

On behalf of Montenegro

Mr. Christoph Lindinger, Schönherr Rechtsanwälte GmbH
Ms. Anne-Karin Grill, Schönherr Rechtsanwälte GmbH
Mr. Michael Stimakovits, Schönherr Rechtsanwälte GmbH
Mr. Slaven Moravčević, Schönherr Rechtsanwälte GmbH
Ms. Jelena Bezarević Pajić, Schönherr Rechtsanwälte GmbH
Mr. Dragan Kujović, Director-General, Directorate for Industry and Entrepreneurship of the Ministry of Economy of Montenegro
Mr. Goran Nikolić, Officer, Directorate for Industry and Entrepreneurship of the Ministry of Economy of Montenegro

Witnesses

Mr. Georgios Iacovou
Mr. Marcos Georgios Dracos
Mr. Michalis Georgiou

Experts

Dr. Monique Sasson
Mr. Alecos Markides
Mr. Nicos Makrides (assistant to Mr. Alecos Markides)
Mr. Kypros Ioannides
Prof. Vuk Radović

Court reporter

Ms. Claire Hill, The Court Reporter Ltd.

27. On 13 April 2016, Claimant and Respondent submitted their respective Costs Submissions ("C-CS" and "R-CS", respectively).

III. FACTUAL BACKGROUND

28. To the extent required for the Tribunal's analysis, the Tribunal briefly summarizes the factual background to the dispute as plead in the Request for Arbitration. This summary does not constitute any finding by the Tribunal on any facts disputed by the Parties.

A. The dispute

29. The present dispute arises out of CEAC's ownership and management of Kombinat Aluminijuma Podgorica, A.D. ("KAP"), an aluminium plant located outside of Podgorica, Montenegro. In 2003, the Montenegrin Government initiated a public tender process to privatize KAP, which had been owned by the State from the time of its construction. Rusal Holdings Limited ("Rusal") ultimately submitted the winning bid for KAP in 2005, and CEAC, as Rusal's affiliate company, entered into the Agreement for the Sale and Purchase of the Shares in Kombinat Aluminijuma Podgorica, A.D. by Public Tender (the "KAP SPA").[2]

30. The KAP SPA was executed by several parties: (i) the Fund for Development of the Republic of Montenegro, the Republic Fund for Pension and Disparity Insurance, and the Bureau for Employment of the Republic of Montenegro (together, the "Sellers"); (ii) Salamon Enterprises Limited[3] (the "Buyer"); (iii) Eagle Capital Group Limited[4] (the "Corporate Guarantor"); and (iv) the Government. Under the KAP SPA, CEAC paid €48,500,000 to the Sellers to acquire approximately 65% of KAP's shares and also undertook to invest an additional €75,000,000 over a five-year period both to improve KAP's facilities and to implement social and environmental programs.[5]

[2] Request for Arbitration, at 15, 16; Exhibit C-7.
[3] Salamon Enterprises Limited changed its name to CEAC Holdings Limited on 1 August 2007. Request for Arbitration, fn. 9; Exhibit C-8.
[4] Eagle Capital Group Limited subsequently changed its name to En+ Group Limited. Request for Arbitration, fn. 10.
[5] Request for Arbitration, at 16-18; Exhibit C-7. Regarding the Government's obligations under the KAP SPA, the Request for Arbitration states that "the Government undertook, *inter alia*, (1) to guarantee a long-term (5 year) electricity supply contract … with the State-owned electricity producer…; (2) to warrant that all pre-2004 accounts provided during the due diligence process were accurate and correct; and (3) to assume responsibility and liability for environmental issues associated with operating KAP and RBN." Request for Arbitration, at 21.

31. In October 2005, CEAC also purchased from the Government a minority share in Rudnici Boksita Nikšić, A.D. ("RBN"), the main supplier of raw materials to KAP, for €6,000,000.

32. As part of its strategy to make KAP profitable, CEAC sought to provide KAP with a dedicated source of electricity. To further this goal, its parent company, En+, bid for and won a tender to purchase all of the shares in the State-owned coal-fired power plant TE Pljevlja and a 31% stake in the State-owned coal mine Rudnik Uglja.[6]

33. According to the Request for Arbitration, CEAC began experiencing problems in 2006 when it allegedly learned that the Government had provided inaccurate financial statements for KAP and RBN during the tender process, which understated KAP's debts and obligations by "tens of millions of euros".[7] Then, the Montenegrin parliament terminated the privatization of TE Pljevlja and Rudnik Uglja "based on dubious reasoning", which compromised KAP's supply of competitively-priced electricity.[8]

34. In an attempt to resolve these issues, CEAC initiated arbitration against the Sellers and Montenegro pursuant to the KAP SPA on 27 November 2007.[9] That arbitration was discontinued pursuant to the Settlement Agreement dated 16 November 2009 between the Sellers and Montenegro, on the one hand, and CEAC, En+, KAP and RBN on the other (the "Settlement Agreement").[10] As a result of the settlement, CEAC transferred 50% of its shares in KAP to the Government, giving the Government an equal stake in KAP (29.3%) and a seat on KAP's board of directors.[11] In exchange, Montenegro undertook, *inter alia*, to subsidize KAP's electricity supply and to issue €135,000,000 in State guarantees to KAP.[12]

[6] Request for Arbitration, at 22.
[7] Request for Arbitration, at 23.
[8] Request for Arbitration, at 25.
[9] Request for Arbitration, at 26.
[10] Request for Arbitration, at 28 and Exhibit C-9.
[11] Request for Arbitration, at 28.
[12] Request for Arbitration, at 30.

35. CEAC alleges that its attempts to restructure and modernize KAP were thwarted by Respondent, which undertook a number of actions aimed at causing KAP to default on its debts, including:

a. Montenegro refused to provide KAP with the electricity subsidies to which it was entitled under the Settlement Agreement;

b. the State-owned electricity company reduced KAP's supply of electricity;

c. Montenegro's representative on the KAP board of directors refused to approve KAP's 2012 financial statements and its business plan, which approvals were conditions of a loan agreement between KAP and Deutsche Bank; and

d. Montenegro refused to provide its written consent as guarantor under that loan agreement.[13]

According to the Request for Arbitration, these actions caused KAP to default on its debt, "which in turn enabled the Government to seize control over CEAC's investment".[14]

36. In June 2013, the Ministry of Finance commenced insolvency proceedings against KAP in the Commercial Court of Podgorica and appointed Mr. Veselin Perisic as an interim insolvency manager of KAP. Mr. Perisic, whose prior consent was required for all actions of KAP's management, allegedly ran the bankruptcy in an irregular manner.[15] In particular, he had KAP enter into an agreement with Montenegro Bonus, a State-owned oil trading company. This agreement made Montenegro Bonus KAP's manager, despite its alleged inexperience in the aluminium business, "thereby enable[ing] the State to reap the benefit of the revenues associated with KAP's aluminium production".[16]

37. Mr. Perisic subsequently announced a public tender for the sale of all of KAP's assets, without seeking the approval of KAP's Board of Creditors, which was responsible for major

[13] Request for Arbitration, at 35.
[14] Request for Arbitration, at 35, 36.
[15] Request for Arbitration, at 37-41.
[16] Request for Arbitration, at 4, 38-40.

decisions in the bankruptcy proceedings.[17] In doing so, he provided an estimate valuing the property at €52,000,000, which according to Claimant is far below the actual market value.[18]

38. Finally, CEAC alleges that "in a hostile attempt to intimidate CEAC", Montenegro initiated "bogus criminal proceedings" against Dmitry Potrubach, a Russian national who had served as the chief financial officer of both CEAC and KAP, for stealing electricity. The Request for Arbitration describes the charges as "absurd and unfounded" and states that when Mr. Potrubach lodged a complaint with the European Court of Human Rights, Montenegro dismissed the local proceedings.[19]

B. The claims and relief sought by Claimant in the Request for Arbitration

39. Based on the alleged facts summarized above, Claimant submits that Montenegro has breached the following obligations under the BIT:[20]

a. to provide fair and equitable treatment;[21]

b. to provide full protection and security;[22]

c. to provide national and most-favoured-nation treatment, including with respect to the "management, maintenance, use, enjoyment, expansion or disposal" of investments;[23]

d. 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;[24]

[17] Request for Arbitration, at 42. CEAC also alleges that Mr. Perisic formed the Board of Creditors of KAP in an unlawful manner, resulting in a Board of Creditors consisting of only three members, none of whom represented CEAC. *Id*., at 41.
[18] Request for Arbitration, at 42.
[19] Request for Arbitration, at 45-48.
[20] Request for Arbitration, at 50.
[21] BIT, Article 2.2, Exhibit CLA-1.
[22] BIT, Article 2.2, Exhibit CLA-1.
[23] BIT, Article 3, Exhibit CLA-1.
[24] BIT, Article 5, Exhibit CLA-1.

e. to guarantee the free transfer of payments;[25] and

f. to "encourage and create stable, equitable, favourable and transparent conditions for [foreign investors] to make investments in its territory".[26]

40. On the merits, Claimant seeks an award granting it a declaration that Montenegro has violated the BIT, monetary compensation, costs, interest and such other relief as the Tribunal deems appropriate.[27]

IV. THE PARTIES' REQUESTS RELATING TO THE ISSUE OF "SEAT"

41. Within the framework of this phase of the proceedings, Claimant has formulated the following request for relief:

> "[…] CEAC respectfully requests the following relief:
>
> 98.1 an award declaring that CEAC is seated in Cyprus, and thus qualifies as an investor pursuant to Article 1(3)(b) of the Treaty;
>
> 98.2 an order joining any other jurisdictional objections Montenegro may have to the merits phase of this dispute;
>
> 98.3 an award requiring Montenegro to pay all costs and fees associated with this phase of the proceedings, plus compound interest.
>
> 98.4 any other relief that the Tribunal may deem appropriate".[28]

42. For its part, Respondent has requested the following from the Tribunal:

> "(A) An award
>
> (i) declaring that Claimant does not have a seat in Cyprus and thus does not qualify as an investor pursuant to Article 1(3)(b) of the Treaty,
>
> (ii) dismissing Claimant's claim, and
>
> (iii) ordering Claimant to bear all fees and expenses of the members of the Arbitral Tribunal and of the International Centre for Settlement of Investment Disputes, as

[25] BIT, Article 6, Exhibit CLA-1.
[26] BIT, Article 2.1, Exhibit CLA-1.
[27] Request for Arbitration, at 73.
[28] Memorial, at 98. See also Reply, at 186.

> well as all fees and expenses incurred by Respondent in relation to this proceeding, including but not limited to the fees of its legal representatives and any experts retained, as well as Respondent's internal resources devoted to this arbitration and interest.
>
> (B) Any other relief that the Tribunal may deem appropriate".[29]

V. RELEVANT LEGAL TEXTS

43. The Tribunal considers it useful, before any presentation of the Parties' respective positions on the issue of "seat", to quote below the legal provisions invoked by the Parties and which are relevant to the Tribunal's analysis.

A. The ICSID Convention and the ICSID Arbitration Rules

44. Article 25 of the ICSID Convention, which is found within Chapter II entitled "Jurisdiction of the Centre", provides in relevant part:

> "(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.
>
> (2) "National of another Contracting State" means:
> […]
> (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration […]".

45. Article 42(1) of the ICSID Convention, which is found within Chapter IV, Section 3 entitled "Powers and Functions of the Tribunal", provides:

> "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable".

[29] Rejoinder, at 171.

B. The Cyprus-Montenegro BIT

46. The Preamble of the BIT reads:

> "The Republic of Cyprus and Serbia and Montenegro …
>
> Desiring to create favourable conditions for greater economic cooperation between the Contracting Parties,
>
> Desiring to create and maintain favourable conditions for reciprocal investments,
>
> Convinced that the promotion and protection of investments will contribute to the enhancement of entrepreneurial initiative and thereby significantly contribute to the development of economic relations between the Contracting Parties
>
> Have agreed as follows".

47. Article 1 of the BIT provides in relevant part:

> "3. The term 'investor' shall mean:
>
> […]
>
> (b) a legal entity incorporated, constituted or otherwise duly organized in accordance with the laws and regulations of one Contracting Party, having its seat in the territory of that Contracting Party and making investments in the territory of the other Contracting Party".

48. Article 9 of the BIT provides in relevant part:

> "4. The arbitral tribunal shall decide the dispute in accordance with the provisions of this Agreement and the applicable rules and principles of international law".

49. Article 10 of the BIT reads:

> "If the laws of either Contracting Party or international agreements, existing at present or established hereafter, between the Contracting Parties or other international agreements whereof the Contracting Parties are signatories, contain provisions entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided by the present Agreement, such laws and agreements shall to the extent that they are more favourable prevail over the present Agreement".

VI. SUMMARY OF THE PARTIES' POSITIONS

A. Claimant's position

50. Claimant submits that CEAC has established a seat in Cyprus within the meaning of Article 1(3)(b) and is therefore an "investor" under the BIT (*7.*). According to Claimant, the meaning of the term "seat" cannot be interpreted autonomously under the Treaty (*2.*), but must be determined by *renvoi* to Cypriot municipal law (*1.*). CEAC further considers that, under Cypriot law, the term "seat" means "registered office" (*3.*), not "real seat" (*4.*), and that this interpretation is supported by Regulation (EU) 1215/2012 of 12 December 2012 of the European Parliament and of the Council on jurisdiction and recognition and enforcement of judgments in civil and commercial matters ("the Recast Brussels Regulation") (*5.*) and the treaty practice of Cyprus and Montenegro (*6.*).

1. The meaning of "seat" under Article 1(e)(b) of the BIT should be determined by a renvoi *to municipal law*

51. Claimant's position is that, since the BIT does not define the term "seat" and no uniformly accepted definition of the term exists under international law, the meaning of "seat" under Article 1(3)(b) of the BIT must be determined by a *renvoi* to Cypriot municipal law.

52. In this respect, Claimant refers to Articles 31 and 32 of the Vienna Convention on the Law of Treaties (the "VCLT"), which indicates the rules of interpretation of international treaties to be followed by the Tribunal in its interpretive process. Claimant considers that there is no hierarchy in the application of the principles set out in Article 31 of the VCLT and adds that the Tribunal should favor an interpretation of the BIT which gives its terms an "appropriate"[30] effect. Further, CEAC submits that Articles 31 and 32 of the VCLT should be applied in conjunction, rather than independently.[31]

53. According to Claimant, the ordinary meaning of the term "seat", as provided in Article 31 of the VCLT, should be determined by means of a *renvoi* to Cypriot municipal law.

[30] Memorial, at 15.
[31] Memorial, at 11-21.

54. Referring to the expert testimony of Dr. Sasson,[32] Claimant contends that, where no accepted definition of a term exists under international law or is given in an investment treaty, international law requires that tribunals refer to municipal law to obtain the precise meaning of a legal concept.[33]

55. Claimant submits that the BIT offers no definition of the term "seat", as used in Article 1(3)(b). Further, because States have adopted varying approaches when it comes to linking companies with a specific system of law, no uniform definition of the term exists under private or public international law. Indeed, under the real seat theory, which is used for instance in France and Germany, the law of the place where the company has its management and control center is the law applicable to that company, regardless of the place of incorporation. Under the incorporation theory, a company is governed by the law where it has been constituted, and the *situs* of the "real seat" is irrelevant. Claimant submits that Cyprus, along with the United Kingdom and other common law jurisdictions, follows the incorporation theory, which means that the concept of "real seat" is not recognized in the sense in which it is understood in jurisdictions such as France or Germany.[34]

56. Claimant disputes Respondent's theory that there might exist an international business law definition of the term "seat". According to Claimant, the only authority Respondent has provided in support of its theory is the *AFT v. Slovakia* award.[35] Claimant considers however that this Tribunal is not obliged to follow the conclusions in that award because the *AFT v. Slovakia* tribunal: (i) was considering a case involving a different treaty, using different language and involving different parties; (ii) failed to explain how it determined the meaning of "seat" in "international business law" and how its approach complied with Articles 31 and 32 of the VCLT; (iii) cited a single source in support of its "seat" theory , which did not contain a definition of "seat" in accordance with international law or set out any standards to determine the concept; (iv) conflated the requirement of "seat" with the requirement of

[32] Sasson First Legal Opinion, at 58.1-58.2.
[33] Memorial, at 22-29.
[34] Memorial, at 30-35.
[35] *Alps Finance and Trade AG v. The Slovak Republic* (UNCITRAL), Award, 5 March 2011 (*"AFT v. Slovakia"*) (Exhibit RL-14).

"real economic activities" from the applicable treaty; and (v) offered reasoning that is contrary to the principle that a holding company can be a viable claimant in an investment treaty case.[36]

57. Claimant further argues that the BIT's context, object and purpose support a *renvoi* to Cypriot municipal law. In its view, Article 10 of the BIT strongly indicates that the Treaty is not a self-contained international instrument that prohibits reference to municipal law. To the contrary, Article 10 of the BIT demonstrates that municipal law has great importance, and the Tribunal should be guided by this context when interpreting Article 1(3)(b) of the BIT. Further, the Preamble reflects the BIT's purpose to promote greater economic cooperation between the Contracting Parties and to create and maintain favorable conditions for investments. In Claimant's view, these goals make it clear that the term "seat" should be interpreted in an inclusive manner, and not as setting hurdles to the protection of Cypriot investors which are unknown to Cypriot law.[37]

58. Claimant disagrees with Respondent's argument pursuant to which the BIT excludes *renvoi* to Cypriot municipal law due to the fact that the term "seat" is not followed by the phrase "in accordance with the laws and regulations of one Contracting Party". According to CEAC, this phrase is unnecessary, as the BIT clearly links "seat" with the "territory" of the host State. A legal entity's seat cannot "exist in a vacuum" but is linked to the jurisdiction of a particular State and defined on the basis of that State's laws and regulations. Claimant adds that, even if "seat" had been followed by the phrase "in accordance with the laws and regulations of one Contracting Party", its meaning would still not have been readily ascertainable from the BIT's text, which again demonstrates that a *renvoi* to municipal law is necessary.[38]

59. Claimant further submits that its interpretation of the term "seat" does not contravene the principle of reciprocity set out in the BIT's Preamble. According to CEAC, reciprocity does not presuppose that threshold questions such as whether a company qualifies as an investor

[36] Memorial, at 36-40.
[37] Memorial, at 43-47, 75-81; Reply, at 88-91.
[38] Reply, at 50-55.

should be decided identically in the case of both Contracting Parties, as argued by Respondent. Rather, reciprocity requires that each Contracting Party accord the same substantive protections to investors of the other Contracting Party. Claimant argues that this is confirmed by Article 3 of the BIT ("National Treatment and Most Favoured Nation Treatment"), wherein it is explicitly stated that reciprocity applies to the treatment of investors. Equally, the Cyprus-Bulgaria BIT – which defines "investor" differently for each contracting State but which has as its goal the mutual encouragement and protection of investments – demonstrates that the circle of protected investors in an investment treaty need not be identical for the treaty to be consistent with the reciprocity principle.[39]

60. Claimant considers that this interpretation is not contradicted by the Permanent Court of International Justice's (the "PCIJ") conclusions in the *Exchange of Greek and Turkish Populations* case.[40] In that case, the PCIJ had to establish the meaning of the term "established" in Article 2 of the Convention of Lausanne. The PCIJ found that the term described a situation of fact – not a legal term of art. Consequently, that term could be construed according to its natural meaning and not according to national legislation. Claimant argues that in this case, "seat" is a legal term of art with distinct and specific legal meanings within different municipal law systems. While in the PCIJ case, a *renvoi* to municipal law would have resulted in uncertainties, difficulties and delays, in this case it is the only means of establishing the meaning of "seat". CEAC adds that the *Exchange of Greek and Turkish Populations* case supports its position that, where a treaty refers to a legal concept with no express direction on how to interpret it, *renvoi* to municipal law is required. *Renvoi* can only be excluded if the interpretation of the concept under municipal law conflicts with the intention of the State parties to the treaty, and that treaty is self-contained.[41]

61. Claimant therefore concludes that the meaning of the term "seat" under Article 1(3)(b) of the BIT should be determined by a *renvoi* to Cypriot municipal law.

[39] Reply, at 60-67, 77-80.
[40] *Exchange of Greek and Turkish Populations*, Advisory Opinion no. 10, 21 February 1925, PCIJ, Series B, No. 10, Exhibit 27 to Sasson First Legal Opinion (*"Exchange of Greek and Turkish Populations"*).
[41] Reply, at 68-74.

2. An "autonomous" interpretation of "seat" is incorrect as a matter of international law

62. Claimant further argues that Respondent's autonomous interpretation of the term "seat", with the term requiring a "real connection" or "genuine link" between the investor and the host State, is incorrect as a matter of international law. It is premised on the assumption that "seat" is a practical concept, rather than a legal term of art, a theory with which CEAC disagrees.[42]

63. Claimant is of the view that Respondent's interpretation is also unreasonable, as in practice it would effectively nullify the BIT in relation to most Cypriot investors, the vast majority of which are holding companies with the sole purpose of holding investments. Relying on the witness testimony of Mr. Iacovou, Claimant submits that, when entering into the BIT, it was the intention of the Cypriot Government that all companies incorporated and having their registered offices in Cyprus benefit from the Treaty's protections. Moreover, had the Contracting Parties to the BIT wished to exclude holding companies or pass-through entities from protection, they would have included specific language to this effect, such as a denial of benefits clause. Since such a clause does not exist, it would be wrong to imply one into the Treaty.[43]

64. Claimant further disagrees with Respondent's argument that the BIT only protects "entrepreneurs" from either Contracting Party. In this respect, CEAC argues that the Treaty envisages the protection of legal entities in addition to natural persons. Further, because the BIT does not contain a denial of benefits clause, the ultimate origin of capital is not a relevant consideration for the purposes of determining investor status.[44]

[42] Reply, at 18, 25.
[43] Reply, at 4-13, 18, 82-84, 100-103.
[44] Reply, at 81, 85-87.

65. Claimant adds that the legal authorities referred to by Respondent in support of its "real seat" theory are irrelevant and inapplicable to the facts of this case.

66. In this respect, Claimant argues that Article 9 of the ILC Articles on Diplomatic Protection (the "Diplomatic Protection Articles")[45] is inapposite, as it is inconsistent with Article 1(3)(b) of the BIT. The Commentaries to the Diplomatic Protection Articles specify that they "do not apply to the alternative special regime for the protection of foreign investors provided for in bilateral and multilateral investment treaties … 'to the extent that' they are inconsistent with the provisions of a BIT".[46] Referring to the expert testimony of Dr. Sasson, Claimant submits that the Treaty provides an exhaustive list of requirements for qualification as an investor. This renders the Diplomatic Protection Articles essentially incompatible with the BIT.[47]

67. Claimant argues that, even if the Tribunal were to find the Diplomatic Protection Articles relevant, they are not an authoritative statement of customary international law. In any event, CEAC satisfies the requirements of both customary international law, which determines nationality by reference to the place of incorporation, and of the Diplomatic Protection Articles, which provide that incorporation and the existence of a registered office are sufficient to establish a company's nationality. Claimant further notes that in *Diallo*[48]*,* the ICJ rejected the theory that the Diplomatic Protection Articles require a "close connection" or "genuine link" between a legal entity and its State of nationality. Further, Claimant argues that, contrary to Respondent's position, the requirements of "seat of management" and

[45] Article 9 of the Diplomatic Protection Articles reads as follows:
> "For purposes of the diplomatic protection of a corporation, the State of nationality means the State under whose law the corporation was incorporated. However, when the corporation is controlled by nationals of another State or States and has not substantial business activities in the State of incorporation, and the seat of management and the financial control of the corporation are both located in another State, that State shall be regarded as the State of nationality."

[46] Reply, at 29, quoting from ILC Draft Articles on Diplomatic Protection with Commentaries, p. 90 (Exhibit CL-138).
[47] Reply, at 26-29.
[48] *Ahmadou Safio Diallo (Republic of Guinea v. Democratic Republic of the Congo),* Preliminary Objections, Judgment, I.C.J. Reports 2007, p. 582, at 88 (Exhibit CL-127) (*"Diallo"*).

"financial control" under Article 9 of the Diplomatic Protection Articles are not cumulative, but alternative.[49]

68. Claimant also contends that Respondent's reliance on *Nottebohm*[50] is misplaced. Investment arbitration tribunals such as *Rompetrol v. Romania*[51] have emphasized that Article 27 of the ICSID Convention expressly excludes the application of customary international law rules on diplomatic protection. Further, referring to Brownlie's *Principles of Public International Law*, Claimant submits that *Nottebohm* concerns the diplomatic protection of natural persons, not legal entities, and that "no absolute test of 'the genuine connection' has found general acceptance".[52] Consequently, CEAC submits that the "main seat of interests" and the "center of … interests and … business activities" criteria laid out in the *Nottebohm* case only apply to natural persons and then only to a limited extent.[53] As stated in the Commentaries to the Diplomatic Protection Articles:

> "Draft article 4 [State of Nationality of a Natural Person] does not require a State to prove an effective or genuine link between itself and its national, along the lines suggested in the Nottebohm case … the Commission took the view that there were certain factors that served to limit Nottebohm to the facts of the case in question … This suggests that the Court did not intend to expound a general rule applicable to all States."[54]

69. Claimant adds that Respondent's theory that one must look at the place of residence of the "effective" or "real" representative to determine a company's seat has no basis under international law. Moreover, it would lead to the absurd result that each legal entity must have one single representative to act on its behalf, and the nationality of that representative would determine the nationality of the company.[55]

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[49] Reply, at 30-33.
[50] Nottebohm case (*Liechtenstein v. Guatemala*), Second phase, Judgment, 6 April 1955, pp. 13-16, at 25 (Exhibit RL-70) (*"Nottebohm"*).
[51] *The Rompetrol Group N.V. v. Romania* (ICSID Case No ARB/03/3), Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, 18 April 2008, at 101 (Exhibit CL-133) ("*Rompetrol v. Romania*").
[52] Reply, at 34-36, quoting from IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (1990), at 706 (Exhibit CL-137).
[53] Reply, at 37.
[54] Reply, at 37, quoting from ILC Draft Articles on Diplomatic Protection with Commentaries, p. 33 (Exhibit CL-138).
[55] Reply, at 35, 39.

70. Claimant considers that the reference to a "permanent establishment" (as opposed to "seat") within the Double Taxation Treaty ("DTT") between Cyprus and Montenegro cannot be used to imply an "effectiveness of representative" requirement into the completely unrelated BIT. The DTT between Cyprus and Montenegro is inapposite in this case because it has an entirely distinct object, purpose and subject matter from that of the BIT.[56]

3. Under Cypriot law, a company's seat is determined by the location of its registered office

71. Referring to the expert testimony of Mr. Markides,[57] Claimant submits that, when including the term "seat" in Article 1(3)(b) of the BIT, Cyprus could only have been referring to the Cypriot law concept of "registered office".

72. In this respect, Claimant notes that Cyprus is a jurisdiction following the incorporation theory with respect to determining the *lex societatis* of a company. Cypriot law does not recognize the concept of "real seat", as this term is used in France or Germany, and the Cypriot legal concept which most closely resembles "seat" is a company's registered office.[58] According to Claimant, the meaning of "seat" as applied to Montenegrin investors under the BIT may very well be different, but that other meaning of "seat" is irrelevant to this case. In Claimant's view, the fact that the term "investors" will have a different meaning with respect to each State does not contravene the *effet utile* principle.[59]

73. Under Section 102(1) of the Cypriot Companies Law (the "Companies Law"), Chapter 113, every Cypriot company must maintain a registered office in Cyprus. A registered office is the location where a company's registers must be kept. It is also the location where a company can be validly served process and receive communications and notices.[60]

74. According to Claimant, this interpretation of the term "seat" does not run counter to the principle of effectiveness. In its view, the obligation to maintain a registered office is distinct

[56] Reply, at 41-44.
[57] Markides First Legal Opinion, at 8-12.
[58] Memorial, at 48-52.
[59] Reply, at 96-99.
[60] Memorial, at 49-53.

from the concept of incorporation under Cypriot law. Incorporation is the process of a company's formation and registration with the Registrar of Companies, which gives a company separate legal personality. By contrast, the obligation to maintain a registered office arises either from the date on which a company begins to carry on business or from the fourteenth day after the day of incorporation. The distinction between the two concepts is further evidenced by the fact that, under certain conditions, a Cypriot company may transfer its registered office to or outside of Cyprus, which effects a change in the proper law of the company. A company may also be in breach of its obligation to designate a registered office.[61]

75. Further, the Cyprus-Benelux BIT includes in its definition of investor both the incorporation and the registered office requirements, which means that the two concepts are not coterminous.[62]

76. Claimant does not consider that the Greek version of the BIT, which includes the adjective "permanent" before the word "seat" ("*edra*"), contradicts its position. First, Claimant notes that the English version of the Treaty is controlling and that this version does not contain the word "permanent". Therefore, the use of this term cannot carry a lot of weight in the Tribunal's interpretive process. Moreover, contrary to what Respondent is arguing, the use of the word "permanent" before "seat" does not contravene the *effet utile* principle if "seat" is interpreted as "registered office". According to CEAC, because the term "seat" by itself is ambiguous and a registered office is by its nature permanent, the addition of "permanent" in the Greek version of the BIT can only further suggest that "seat" means registered office. Otherwise, in Respondent's interpretation, the BIT would require that an investor have a "permanent real seat", a concept that Montenegro does not make any effort to explain.[63]

77. Claimant further refers to Respondent's table comparing the various translations of the word "*edra*" between English and Greek in a number of legal texts. According to CEAC, there are five possible translations of the word "seat" (with or without qualifying adjectives): seat;

[61] Memorial, at 54-56; Reply, at 94, 95, 108, 111-115.
[62] Reply, at 116-118.
[63] Reply, at 119-122.

statutory seat; real seat; registered office; and head office. Claimant submits that Respondent cannot conclude that the term "seat" cannot mean "registered office" when this is one of the possible translations of the term and, incidentally, the translation which has been adopted by the Office of the Law Commissioner of Cyprus (the "OLC") for the Companies Law.[64]

78. Finally, Claimant submits that its interpretation of the term "seat" is conclusive in this case, because the concept of "registered office" is not "wholly unreasonable" or "abhorrent to international law".[65]

4. Under Cypriot law, "seat" cannot be understood to mean "real seat"

79. Claimant considers that Montenegro's argument pursuant to which "seat" under Article 1(3)(b) of the BIT should be interpreted to mean "real seat" is flawed. It is based on an interpretation of the Treaty as if it were a Cypriot domestic instrument and relies upon irrelevant sources.[66]

80. In this respect, Claimant takes issue with Respondent's reliance on Council Regulation (EC) No. 2157/2001 of 8 October 2001 on the Statute for a European company ("SE") (the "SE Regulation") as support for the argument that this piece of legislation introduced the concept of "real seat" in Cyprus. According to Claimant, the SE Regulation is of no assistance to the Tribunal, because CEAC is not an SE. The Regulation's scope of application is limited to SEs and does not modify Member States' company laws. Claimant submits that the Companies Law was unaffected by the entry into force of the SE Regulation. Moreover, the SE Regulation can have no impact on earlier BITs – such as the one at issue in the present case – which included the term "seat" before the SE Regulation entered into force. Claimant adds that, in any event, the SE Regulation does not define or explain the meaning of the terms "real seat" or "head office".[67]

[64] Reply, at 123-127.
[65] Memorial, at 64, referring to NEWCOMBE AND PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT (Kluwer, 2009), at 96 (CL-118).
[66] Reply, at 129-131.
[67] Reply, 132-141.

81. Claimant also disagrees with Respondent's interpretive methodology. In its view, Respondent's expert Mr. Ioannides interprets the BIT as if it were a domestic Cypriot statute, using English law principles of construction instead of applying the VCLT, which is inappropriate. Further, Claimant rejects Respondent's analogy with Cypriot laws on tax residency, and specifically the distinction Montenegro tries to make between the concepts of "domicile" (which Mr. Ioannides assimilates to incorporation) and "residence" (which Mr. Ioannides views as an economic concept). In the view of CEAC, taxation laws are a special category of legislation that is designed to regulate a particular type of social relationship. Taxation laws cannot be applied by analogy to contexts they were not designed to regulate. In particular, Claimant takes issue with Mr. Ioannides' reliance on the Supreme Court of Cyprus' decision in the *OMAS* case.[68] According to CEAC, the *OMAS* decision provided guidance on the meaning of the word "seat" solely for purposes of the Value Added Tax Law of 2000 and does not provide any guidance on the meaning of the word "seat" as a matter of general law.[69]

5. The Recast Brussels Regulation supports a finding that CEAC has a seat in Cyprus

82. Claimant further submits that its interpretation of the term "seat" under Article 1(3)(b) of the BIT is also confirmed by the Cypriot rules on the conflict of laws and by the Recast Brussels Regulation. Claimant considers that the Recast Brussels Regulation, as a legal instrument of European Union law, is an applicable rule and principle of international law, as envisaged by Article 9(4) of the BIT and by Article 31(3)(c) of the VCLT.[70]

83. CEAC argues that, according to the Cypriot rules on conflict of laws, the seat of a Cypriot company is determined by the location of its registered office. In this respect, Cypriot law

[68] *OMAS (Cyprus) Ltd v. Republic of Cyprus* (2008) 3 A.A.D. 253 (*"OMAS"*), referred to in Ioannides First Legal Opinion, at 14.16, 15.1-15.7.
[69] Reply, at 142-151.
[70] Memorial, at 57-61, 69, 73.

follows the position of English law, according to which the domicile of a corporation is the place of its incorporation.[71]

84. Claimant adds that, under the Recast Brussels Regulation, which has direct effect in Cyprus, Member States' courts are directed to apply their private international law rules in order to determine where a company is seated. In the case of Cyprus, this means that courts will determine the location of a company's seat by reference to the incorporation theory. Moreover, in relation to Cyprus, the Recast Brussels Regulation expressly recognizes that a company's registered office is the connecting factor that establishes domicile and determines the jurisdiction of courts within the EU.[72]

6. The treaty practice of Cyprus and Montenegro confirms that "seat" means "registered office" with regard to Cypriot investors

85. According to Claimant, its interpretation of the term "seat" is also confirmed by the treaty practice of both Cyprus and Montenegro.

86. In this respect, Claimant submits that, of the 27 Cypriot BITs it is aware of, 13 contain language that is substantially identical to the provision at issue in these proceedings, requiring both incorporation of a legal entity and the existence of a seat in the host State. An additional six treaties refer only to "constitution", "incorporation" or "registration" in the host State, without more. Five other treaties include additional requirements, such as "control" (the Cyprus-Israel BIT and the Cyprus-Italy BIT) or "real business activities" (the Cyprus-Iran BIT, the Cyprus-Jordan BIT and the Cyprus-Malta BIT). In a similar vein, the Montenegro-Austria, Montenegro-Netherlands and Montenegro-Moldova BITs contain express references to the ultimate "control" of the notional investors. The Montenegro-Switzerland, Montenegro-Macedonia and Montenegro-Moldova BITs also expressly require that the potential investor carry out "real" or "substantial" business activities in the host State. [73]

[71] Memorial, at 57, 59, 60.
[72] Memorial, at 58, 61.
[73] Memorial, at 84-90.

87. Claimant interprets this treaty practice to mean that, when Cyprus and Montenegro have intended to stipulate more stringent requirements on investors than proving the existence of a "seat", they have employed express language to this effect. The fact that the BIT does not include such requirements can only mean that both Contracting Parties intentionally chose not to do so.[74]

88. Claimant also submits that the treaty practice of Cyprus and Montenegro shows that these two States have used the terms "registered office" and "seat" interchangeably. Indeed, while the Cyprus-Benelux BIT and the Montenegro-Benelux BIT use the term "registered office" in addition to "incorporation" in their definition of investor, Cyprus' BITs with Israel, Iran and Jordan employ the term "seat", without any reference to a "registered office".[75]

7. CEAC has its "seat" in Cyprus as a matter of Cypriot law

89. Claimant submits that at all relevant times, CEAC maintained its registered office at Dimosthenous 4, 1101, Nicosia, Cyprus. Claimant argues that CEAC's certificates of registered office, dated 2005, 2006, 2007, 2008, 2010, 2011, 2012 and 2013[76] represent conclusive evidence to this effect.[77]

90. In the alternative, should the Tribunal consider that the term "seat" within the meaning of Article 1(3)(b) of the BIT requires that CEAC have a "real connection" or "genuine link" with Cyprus, or that CEAC have its central management and administration in Cyprus, Claimant submits that this requirement is met as well.[78]

91. Referring to Clause 3 of the Memorandum of Association,[79] Claimant submits that CEAC is by its nature a holding company, which carries out the activities and functions that are typical of such an entity. The Tribunal's analysis should start from this premise and not be influenced by the external appearance of the physical buildings where CEAC is located.

[74] Memorial, at 86, 90; Reply, at 92, 93.
[75] Memorial, at 94-97.
[76] Exhibits C-20, C-70, C-80, C-90, C-95, C-56, C-100 and C-103.
[77] Memorial, at 62, 63; Reply, at 154.
[78] Reply, at 155.
[79] Exhibit C-19.

Claimant submits that, in any event, CEAC carries out its central administration and management from Cyprus and conducts its business in all material respects from Cyprus.[80]

92. In particular, CEAC submits that its predecessor, Salamon Enterprises Ltd ("Salamon") was incorporated on 30 June 2004 and its sole director and secretary positions were held by Mr. Chrysanthou and C&P Corporate Services, a Cypriot national and a Cypriot legal entity.[81] Salamon's Certificate of Incumbency of 1 December 2005 stipulated that the Board of Directors comprised C&P Corporate Services and Mr. Chrysanthou, and that the Board was authorized to execute all powers of the company.[82] Claimant states that the Board passed resolutions in the exercise of this power on several occasions, including resolutions related to potential investments in Montenegro.[83] The structure of the Board subsequently changed so that in September 2012 and April 2013 it included only C&P Corporate Services as the sole director, while Mr. Chrysanthou was Secretary.[84] Claimant also refers to a letter dated 25 January 2011 sent by CEAC to VTB Bank (Austria),[85] confirming that the address of the registered office was the place of CEAC's management and administration.[86]

93. Claimant adds that, in furtherance of its object, CEAC carries out the sale and purchase of shares in Cyprus, including, in April 2006, 100% of the share capital in a BVI-incorporated company for consideration of USD 12 million.[87] Claimant also draws the Tribunal's attention to CEAC's balance sheets and financial statements for the years 2005, 2006, 2007, 2008 and 2009 as support for its submission that CEAC held assets, had liabilities and reported losses which are evidence of real economic activity in Cyprus. Further, CEAC instructed auditors, accountants and other consultants to perform professional services in Cyprus, and in all situations correspondence was sent to CEAC's registered office.[88] Indeed,

[80] Reply, at 156-161.
[81] Exhibits C-6, C-94.
[82] Exhibit C-66.
[83] Exhibits C-46, C-47, C-48, C-63, C-64 and C-79. See Claimant's Closing Presentation, at slides 68-71.
[84] Exhibits C-101, C-102.
[85] Exhibit C-97.
[86] Reply, at 162-164.
[87] Exhibit C-69.
[88] Reply, at 166-169.

CEAC received at least 16 letters at its registered office from Respondent and its counsel at Schönherr.[89]

94. As an alternative argument, Claimant reiterates its position that CEAC is and has been a tax resident of Cyprus, as proven by its tax residency certificates of 2005, 2014 and 2015 and by its income tax return of 2007. Claimant submits that, for a legal entity to be a tax resident under Cypriot law, it must be managed and controlled from Cyprus. Claimant states that, while the concept of "management and control" has not been defined in Cypriot law or addressed by the courts of Cyprus, it is appropriate to look for its meaning in English common law, which has been incorporated into the Cypriot legal system. According to Claimant, the English Court of Appeal decision *Wood v. Holden* sets out the relevant standard: what is needed for the exercise of "management and control" is "some level of discretion that is exercised by the company within the jurisdiction", which can be demonstrated by the fact that directors of the company executed documents there.[90]

95. Further, Claimant points out that it holds bank accounts at Bankas Snoras (a Lithuanian bank), Deutsche Bank, Russian Commercial Bank and Soyuz Commercial bank, with Mr. Chrysanthou and/or Ms. Antoniou being the authorized signatories. Claimant has also concluded various agreements for the provision of legal and consultancy services, some of which concerned legal services in relation to aluminum, mining, power generation and other industries in Montenegro. CEAC has granted powers of attorney to overseas counsel (authorized by the signature of Mr. Chrysanthou or Ms. Antoniou) for activities such as, for instance, the negotiation of a loan facility, the execution of documents, and the representation of its interest in these arbitration proceedings.[91]

96. Based on all these considerations, Claimant submits that CEAC satisfies the requirement of "seat" under Article 1(3)(b) of the Treaty.

[89] Exhibits C-23 to C-29 and C-31 to C-39. See Claimant's Closing Presentation, at slides 57-60.
[90] *Wood and another v. Holden*, [2006] 1 W.L.R. 1393, at 2-3 (Exhibit CL-37); Reply, at 173-175.
[91] Reply, at 176-185.

B. Respondent's position

97. Respondent's position is that Claimant bears the burden of proving the meaning of the term "seat" under the BIT and that it satisfies this requirement,[92] but that Claimant has failed to discharge this burden (*5.*). Respondent considers that the term "seat" should be interpreted autonomously under the Treaty (*1.*) and that it requires something more than incorporation and an address under both international law (*2.*) and Cypriot law (*3.*). In Montenegro's view, "seat" under Article 1(3)(b) of the BIT is the place where a legal entity is effectively managed and financially controlled and where it carries out its business activities (*4.*). It is not equivalent to tax residency, which, in any event, CEAC does not have (*6.*).

1. The term "seat" should be interpreted autonomously under the BIT

98. Respondent's position is that any question of interpretation of the Treaty, including determining the meaning of the term "seat" under Article 1(3)(b), has to be resolved in accordance with the rules contained in Articles 31-33 of the VCLT. Because these rules do not contain any reference to national law, the term "seat" needs to be interpreted autonomously under the Treaty, without a *renvoi* to municipal law.

99. Referring to the principle of "good faith", enshrined in Article 31(1) of the VCLT, Respondent argues that Article 1(3)(b) of the BIT sets a high threshold for legal entities to qualify as protected investors. Three conditions must be fulfilled in this respect: (i) legal existence; (ii) seat; and (iii) the making of investments. While legal existence (through incorporation, constitution or other due organization) is defined in reference to "the laws and regulations of one Contracting Party", this latter requirement is separated by a comma from the other two elements, seat and the making of investments. Respondent interprets this to mean that "seat" cannot be understood by reference to the Contracting Parties' municipal laws. Respondent considers that this conclusion is reinforced if one looks at the -Cyprus-Bulgaria BIT, where the term "seat" is expressly defined by reference to Cypriot law.[93]

[92] Counter-Memorial, at 7-12.
[93] Counter-Memorial, at 46-57; Rejoinder, at 14-16, 28-30.

100. Respondent further contends that the object and purpose of the BIT do not support a *renvoi* to municipal law for the interpretation of the term "seat". According to Montenegro, the Title of the BIT and its Preamble establish two fundamental principles: reciprocity and the development of economic relations between the Contracting Parties.[94]

101. Respondent considers that the overarching purpose of reciprocity would be defeated if the Contracting Parties applied their domestic laws in order to define the term "seat". Cyprus is a jurisdiction following the incorporation theory, which means that the law applicable to a legal entity is the law of the State of incorporation, regardless of where that entity carries out its activities or is managed. By contrast, Montenegro has adopted the "real seat" theory, pursuant to which the law applicable to a legal entity is the law of the jurisdiction where the entity has its real seat (provided that the law of the jurisdiction where an entity has its real seat accepts this basis for the determination of applicable law). Respondent argues that the "seat" test needs to fulfill its function in an even manner with respect to both Contracting Parties, which means that it must be conducted on the basis of reciprocal and identical criteria. Otherwise, if the Tribunal were minded to accept Claimant's interpretation of the term "seat", this would mean that the circle of protected Montenegrin investors would be different from the circle of protected Cypriot investors. Indeed, in such a scenario, Montenegrin shell companies would not benefit from Treaty protection, whereas Cypriot shell companies would.[95]

102. Respondent considers that this conclusion is not affected by the fact that the Cyprus-Bulgaria BIT, while mentioning reciprocity in the preamble, defines investors based on asymmetrical criteria for the two contracting parties. Respondent considers that, even though reciprocity is stated as a purpose for numerous international treaties, State parties are free to limit its sphere of application if they so wish. However, no such limitation exists in the BIT.[96]

103. Respondent refers in this respect to the Advisory Opinion of the PCIJ in *Exchange of Greek and Turkish Populations*. In that case, the PCIJ interpreted the term "established"

[94] Counter-Memorial, at 58-64.
[95] Counter-Memorial, at 65-79; Rejoinder, at 37-44.
[96] Rejoinder, at 45, 46.

autonomously under the applicable treaty, stating that it could not have been the intention of the contracting parties to define this criterion by reference to differing provisions in their national legislation. Respondent considers that it is also in the spirit of the BIT that protection should be accorded to legal entities of both States that satisfy identical and reciprocal criteria.[97]

104. Respondent adds that the purpose of developing economic relations between Cyprus and Montenegro would not be served if Cypriot special purpose vehicles ("SPVs"), used as pass-through entities, and with no substantial involvement in making the investment, were protected as investors under the BIT. Referring to *Standard Chartered v. Tanzania*,[98] Respondent argues that the BIT's purpose of promoting investments by nationals of the Contracting Parties would be defeated if the national of the Contracting State had no role in deciding to make the investment, to fund it or in controlling or managing it. In particular, Respondent quotes the following reasoning of the *Standard Chartered v. Tanzania* tribunal:[99]

> "It is difficult to see how the treaty's protections could promote investment by nationals of a Contracting State if the national of the Contracting State had no role in deciding to make the investment, funding the investment, or controlling or managing the investment after it was made."[100]

105. Respondent argues that, in the case before the Tribunal, the management services firm which provides SPV support services to Claimant in Cyprus did not have any role in making any investment decisions, or in adopting any managerial or entrepreneurial initiative with respect to Claimant's investment in Montenegro. All of these decisions were made outside of Cyprus.[101]

[97] Counter-Memorial, at 80-86.
[98] *Standard Chartered Bank v. The United Republic of Tanzania* (ICSID Case No. ARB/10/12), Award, 2 November 2012 ("*Standard Chartered v. Tanzania*") (Exhibit CL-110).
[99] Counter-Memorial, at 87-92; Rejoinder, at 47-52.
[100] *Standard Chartered v. Tanzania*, at 228.
[101] Rejoinder, at 53-55.

106. Respondent further contends that Claimant's reliance on Article 10 of the BIT is misplaced. Article 10 provides for the application of more favorable provisions included in domestic law only once an entity qualifies as an investor pursuant to Article 1(3) of the Treaty.[102]

107. Respondent disputes CEAC's contention that the BIT reflects the Cypriot Government's policy of creating a business friendly environment for holding companies. It contends that CEAC has offered no concrete evidence of this policy or of the fact that it was accepted by Montenegro. Further, if the purpose of the Cypriot Government had been to protect all Cypriot companies, they would not have agreed to employ the term "seat" in the definition of investor or at least they would have used the term "registered office".[103]

108. Referring to Article 32 of the VCLT, Respondent argues that the Tribunal should disregard the witness testimony of Mr. Georgios Iacovou because it does not include content that was created by both Contracting Parties during the negotiation of the BIT. Respondent considers that Mr. Iacovou's testimony does not reflect the common understanding of Cyprus and Montenegro as to the meaning of Article 1(3)(b) of the Treaty and cannot make up for the fact that it was impossible to obtain the *travaux préparatoires* for the BIT. Respondent adds that any documents from a "unilateral source" may only be taken into account if they were introduced into the negotiation process or at least brought to the attention of the other party to the negotiations. Mr. Iacovou's testimony does not satisfy this requirement.[104]

109. Respondent also finds Claimant's reliance on the Contracting Parties' treaty practice to be unconvincing. In particular, Respondent takes issue with the fact that Cyprus, a jurisdiction which has adopted the incorporation theory and which does not employ the term "seat", has chosen to use that term 18 times instead of using what Claimant deems to be its equivalent, i.e. "registered office". Further, Cyprus has defined investors by reference only to incorporation in six bilateral investment treaties, which means that its choice not to do so in the BIT must have been deliberate. The fact that in three treaties the requirement of "(real) business activity" is used in addition to both "incorporation" and "seat", does not mean that

[102] Counter-Memorial, at 96-100.
[103] Counter-Memorial, at 102-106.
[104] Rejoinder, at 31.

in the 14 treaties where "seat" was used as a self-standing requirement, it did not refer to a genuine connection between the investor and the host State. [105]

2. The term "seat" cannot be construed to mean incorporation and address

110. Respondent contends that the term "seat", when interpreted autonomously under the Treaty requires something "more than a registered office, i.e. an address".[106]

111. In this respect, Respondent first refers to the Greek version of the BIT. While the standard Greek translation of the term "seat" is "*edra*", the BIT provides in Article 1(3)(b) "*ehi monima ten edra tis*", which means "permanently has its seat". Respondent accepts that the English version of the BIT is controlling. However, it also argues that the nuance present in the Greek version of the Treaty should be taken into account by the Tribunal.[107]

112. Relying on the *effet utile* interpretive principle, Respondent argues that the term "seat" requires something more than mere incorporation or a legal and factual consequence of it. Respondent notes that every legal entity incorporated in Cyprus must have a registered office. Therefore, interpreting the term "seat" to mean "registered office" would render part of Article 1(3)(b) redundant and would be contrary to the *effet utile* principle. Respondent adds that, in light of the permanent nature of a registered office under Cypriot law, the use of the adverb "permanently" in the Greek version of the BIT would not make any sense if "seat" were to be interpreted as "registered office".[108]

113. Respondent further submits that, while it is true that a legal entity incorporated under the Companies Law can transfer its registered office outside of Cyprus, it is also true that Article 354O of the same law provides that, as a result of the transfer, the entity in question will be stricken off the Register of Companies and will cease to be a registered company in Cyprus.[109] To Montenegro, this further underscores that there is no such thing as a legal entity constituted under Cypriot law which does not have a registered office in Cyprus. In a

[105] Counter-Memorial, at 107-117.
[106] Counter-Memorial, at 123.
[107] Counter-Memorial, at 125-128; Rejoinder, at 65-67.
[108] Counter-Memorial, at 129, 130, 132-136; Rejoinder, at 19-22, 68, 69.
[109] Appendix D to the Markides First Expert Legal Opinion, Companies Law, Article 354O.

similar manner, while a company may fail to comply with its obligation to designate a registered office, the necessary consequence of this is that such a company may be stricken off the Register of Companies.[110]

114. Respondent concludes that, because a registered address is simply a necessary consequence of incorporation, an interpretation of Article 1(3)(b) of the BIT in accordance with the *effet utile* principle requires that "seat" have a more substantial meaning.

3. Under Cypriot law, the term "seat" requires more than incorporation and address

115. Respondent argues that, even under Cypriot law, the term "seat" cannot be equated to "registered office".

116. In its view, there is nothing in the record to support a conclusion to the contrary, with the exception of the expert testimony of Mr. Markides. According to Montenegro, this testimony does not withstand scrutiny because it is premised upon the false argument that the "real seat theory" would be unknown to Cypriot law. Respondent invokes in this respect the SE Regulation, which is part of Cypriot law and entered into force before the conclusion and ratification of the BIT. Respondent submits that the SE Regulation employs the "real seat" theory for SE companies, which means that this theory is a binding part of Cypriot law.[111]

117. Respondent further argues that the term "seat" is used in a multitude of legal texts and contexts in Cypriot law, including directly applicable EU law, but the Greek translations of this term are by no means consistent. For instance, when preparing the official translation of the Companies Law in September 2012, the OLC used the English term "registered office" once and the term "head office" twice to translate the same term ("*edra*"). In Article 2(1) of the SE Regulation the term "registered office" in the English version is reflected in the term "*katastatike edra*" in the Greek translation. The term "*katastatike edra*" also appears in the Greek version of Article 63(2) of the Recast Brussels Regulation to mirror the English term "statutory seat". Respondent concludes that the term "registered office" is better reflected in

[110] Rejoinder, at 20.
[111] Counter-Memorial, at 149-160; Rejoinder, at 61-64.

the term "statutory seat" and not the term "seat", which has a much wider connotation. This conclusion is further supported by the fact that the Cypriot law implementing the SE Regulation replaced the term "statutory seat" used in the Greek translation of the SE with the term "registered office".[112]

118. Respondent adds that the Recast Brussels Regulation does not support Claimant's contention that the term "seat" means "registered office" under Cypriot law. In this respect, Respondent underlines that the Recast Brussels Regulation does not employ in Article 63(2) the term "seat", but "statutory seat". Further, the Recast Brussels Regulation serves an entirely different object and purpose from the BIT, which means that it is not particularly helpful in interpreting the latter. The Recast Brussels Regulation also expressly excludes from its sphere of application "the liability of the State for acts and omissions in the exercise of State authority" and "arbitration" (Article 1(1) and (12)).[113]

4. The meaning of the term "seat"

119. Respondent's main position in this arbitration is that the term "seat" needs to be interpreted autonomously under the BIT and that it means the place where a legal entity is effectively managed and financially controlled and where it carries out its business activities. Respondent submits that, should the Tribunal find that the interpretation of the term "seat" requires a *renvoi* to Cypriot law, the term "seat" would have the same meaning.[114]

120. Autonomous interpretation. In Respondent's view, the term "seat" cannot represent something which is an inseparable consequence of incorporation. Respondent contends 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.[115]

[112] Counter-Memorial, at 161-171; Rejoinder, at 73, 74.
[113] Counter-Memorial, at 172-181; Rejoinder, at 75, 78-80.
[114] Counter-Memorial, at 182-184.
[115] Counter-Memorial, at 185-192.

121. Respondent refers in this respect to the second sentence of Article 9 of the Diplomatic Protection Articles, which provides that, under certain circumstances, a legal entity shall be deemed the national of the State where the seat of the legal entity's management and financial control is located. From this, Respondent draws the conclusion that the two subjects ("the management" and "the financial control") and the two activities ("managing" and "financially controlling") are the decisive factors for linking a legal entity to a specific jurisdiction. Respondent concludes that these criteria ensure a real connection or a genuine link between a legal entity and a jurisdiction and describe where that entity's seat is situated.[116]

122. Respondent also refers to the *Nottebohm* case in support of its position that the "main seat of … interests" and "the center of … interests and … business activities" are relevant to determining where a legal entity's seat is located. It considers that a "real connection" or "genuine link" between the legal entity and a jurisdiction exists "where the representative, who pursues the legal entity's interests, resides and where the legal entity performs business activities".[117]

123. Respondent further draws a distinction between a "statutory representative" – "installed for the sole purpose of complying with the laws relating to the process and the requirements for establishing a legal entity"[118] – and an "effective" or "real" representative – who "effectively thinks, forms views or adopts decisions for the legal entity".[119] Respondent contends that, because the concept of "seat" is a practical concept, concerned with reality and not fiction, it necessarily requires the presence of a "real" representative.[120]

124. Respondent further argues that the DTT between Cyprus and Montenegro, as a category of international law rules referred to in Article 31(3)(c) of the VCLT, can provide useful guidance for the interpretation of the Treaty. In this respect, the word "permanently" in the Greek version of the BIT can be linked to the concept of "permanent establishment" used in

[116] Counter-Memorial, at 194-197.
[117] Counter-Memorial, at 198-205.
[118] Counter-Memorial, at 207.
[119] Counter-Memorial, at 207, 208.
[120] Counter-Memorial, at 207-209.

the DTT. The latter concept requires a real presence of the enterprise of one contracting State in the territory of the other contracting State (a place of management, a branch, an office). Where the enterprise acts solely through an independent agent, a real presence does not exist. Respondent considers that the term "seat" in the BIT establishes similar requirements.[121]

125. Respondent submits that its interpretation of the term "seat" is also confirmed by the *AFT v. Slovakia* tribunal, which stated:

> "Proof of a 'business seat', in the meaning of an effective center of administration of the business operations, requires additional elements, such as the proof that: the place where the company board of directors regularly meets or the shareholders' meetings are held is in Swiss territory; there is a management at the top of the company sitting in Switzerland; the company has a certain number of employees working at the seat; an address with phone and fax numbers are offered to third parties entering in contact with the company; certain general expenses or overhead costs are incurred for the maintenance of the physical location of the seat and related services, which would be a clear indication that a business entity is effectively organized at a given Swiss place."[122]

126. Respondent considers that the principles set out by the *AFT v. Slovakia* tribunal can be replicated in this case as the language employed by the Slovak-Swiss BIT at issue in that case is comparable to the language of the BIT with regard to the term "seat". Moreover, the *AFT v. Slovakia* tribunal interpreted "seat" independently from the additional requirement of "real business activities" in the Slovak-Swiss BIT.[123]

127. In support of its argument that the term "seat" requires that a legal entity have a genuine link or real connection with a State, Respondent also refers to several legal authorities, such as:

> "It has become more and more pertinent to look at the aspect of the control of a corporation when one wants to determine its nationality especially for purposes of international investment arbitration. […] The test of the seat of the corporation requires something more, whether some activities are taking place and whether the corporation is managed from that particular state."[124]
>
> "The seat of a company may not be as easy to determine as the country of organization, but it does reflect a more significant economic relationship between the company and the country

[121] Counter-Memorial, at 210-218; Rejoinder, at 70, 97-101.
[122] *AFT v. Slovakia*, at 217.
[123] Counter-Memorial, at 219-227; Rejoinder, at 102-105.
[124] E. Schlemmer, *Investment, Investor, Nationality, and Shareholders*, in MUCHLINSKY/ORTINO/SCHREUER (EDS), INTERNATIONAL INVESTMENT LAW (2008), at 79 (Exhibit RL-100).

> of nationality. Generally speaking, 'seat of a company' connotes the place where effective management takes place. The seat is also likely to be relatively permanent as well."[125]

128. Interpretation pursuant to Cypriot law. Respondent submits that the term "seat" is very frequently used in Cypriot law, with more than 130 laws and 150 regulations attributing the term various meanings. In order for the interpretation of the term "seat" in the BIT to be accurate, the Tribunal should identify those Cypriot laws and regulations that serve an object and purpose comparable to that of the Treaty. Such body of law is represented, in Montenegro's view, by the SE Regulation which aims at further developing economic relations between Member States. Because the SE Regulation adopts the "real seat" theory, by requiring that a *Societas Europeana* have its registered office and its head office in the same Member State, the term "seat" as used in the BIT must have a comparable meaning.[126]

129. Respondent also refers to the alternative method of interpretation suggested by Mr. Ioannides, which is based on the distinction between "domicile" and "residence". While "domicile" refers to the place of incorporation of a legal entity, "residence" is a substantive concept and designates the place with which an entity has a real connection or genuine link. By applying this distinction to the Treaty, Respondent concludes that an investor's nationality or domicile is dealt with by the requirement of incorporation, while "seat" is the residence of a legal entity, meaning the place of its effective central management and control.[127]

5. Claimant does not have a "seat" in Cyprus

130. Respondent's position is that, regardless of the interpretation of the term "seat", CEAC does not have a seat at Dimosthenous 4, Nicosia, Cyprus. 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.

[125] UNCTAD Series on Issus in International Investment Agreements II, 2011 (Scope and Definition), at 83 (Exhibit RL-96).
[126] Counter-Memorial, at 233-240; Rejoinder, at 81-84.
[127] Counter-Memorial, at 241-253.

131. Respondent disputes that the certificates of registered office issued by the Registrar of Companies of Cyprus are conclusive evidence to the contrary. Montenegro argues that such certificates are issued by the Registrar of Companies on the basis of a filing by the relevant legal entity. However, the Registrar does not carry out any independent investigation, which means that if the filing made by the legal entity is incorrect, so will be the certificate. Equally, if the Registrar makes a mistake, the issued certificate will reflect this mistake. In both situations, an incorrect certificate cannot be conclusive evidence of a registered office. According to Montenegro, "[t]he registered office of a company must be a reality which subsequently may be confirmed through a document such as a certificate of registered office", but "it cannot be … that a certificate would create the reality of a registered office where there is none".[128]

132. Referring to *Soufraki v. UAE*,[129] Respondent argues that international tribunals have the power to make their own nationality determination, even if their ultimate conclusions contradict official documents issued on the basis of municipal law. In the case before the Tribunal, the certificates of registered office do not represent conclusive evidence that CEAC has a registered office in Cyprus and are contradicted by the facts described below.[130]

133. According to Respondent, the building at Dimosthenous 4, Nicosia, Cyprus has no street number and no brass plate for CEAC. In addition, when Respondent 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".[131] Further, not a single contract introduced by Claimant in this arbitration was signed by CEAC's director in Cyprus.[132]

[128] Rejoinder, at 113-120.
[129] *Houssein Nuaman Soufraki v. The United Arab Emirates* (ICSID Case No. ARB/02/7), Decision of the ad hoc Committee on the Application for Annulment of Mr. Soufraki, 5 June 2007 ("*Soufraki v. UAE*") (Exhibit RL-103).
[130] Rejoinder, at 135-140.
[131] Counter-Memorial, at 255.
[132] Counter-Memorial, at 257, 258; Rejoinder, at 126, 127.

134. Respondent adds that the property at that address is not an office and does not evidence that Claimant would have any presence at the premises. Respondent refers in this respect to the witness testimony of Mr. Dracos, who testified:

> "Upon request from the legal counsel of the Respondent, on 23 September 2015 at approximately 9.15am I visited the building at the above address […]. The property appeared not to be occupied. There was no sign or plate bearing CEAC's name on the Property. The Property simply looked like an unoccupied house, and there was nothing to indicate or suggest that it was used as offices by CEAC".[133]

135. In addition, despite the fact that under Cypriot law, a registered office is the place where a company's registries are kept open for inspection to the public, at Dimosthenous 4, Nicosia, Cyprus, no registries are available for inspection by interested third parties. In this respect, Respondent refers to the testimonies of Messrs. Dracos and Georgiou, who visited the property on different occasions in order to inspect the registries, but found no sign of any activity and could not obtain access to Claimant's offices. Respondent concludes that an address which does not fulfill these basic functions does not qualify as a registered office.[134]

6. Tax residency is not equivalent to "seat" and CEAC is not a tax resident

136. Respondent also disagrees with Claimant's argument pursuant to which "seat" under Article 1(3)(b) of the BIT could mean tax residency pursuant to Cypriot law and adds that, even if the Tribunal were to hold otherwise, CEAC is not a tax resident of Cyprus.

137. On a preliminary note, Respondent objects to Claimant relying upon this argument. According to Montenegro, Claimant did not assert that its alleged tax residency would qualify as "seat" in its Memorial, but only added that "for the sake of completeness"[135] CEAC was a tax resident of Cyprus. Respondent therefore considers that this is a new argument raised by Claimant for the first time in its Reply and that the Tribunal should disregard it. For the same reason, exhibits C-104 and C-105 (a tax certificate dated 16 March

[133] Dracos Witness Statement, at 11.
[134] Rejoinder, at 128-134.
[135] Memorial, at 63.

2015 relating to the DTT between the Russian Federation and Cyprus, and a tax certificate dated 4 November 2015 relating to the year 2014) should also be disregarded.[136]

138. Should the Tribunal consider that this new theory is admissible, Respondent argues that it is not supported by any evidence. In this respect, Respondent points out that Mr. Markides was specifically tasked by Claimant with explaining the meaning of the term "seat" in Article 1(3)(b) of the BIT from the perspective of a Cypriot lawyer, and stated:[137]

> "Resorting to the provisions of tax legislation of Cyprus for the purposes of this opinion is inappropriate and may dangerously mislead the Tribunal".[138]

139. Respondent adds that, in any event, CEAC is not a tax resident of Cyprus. According to Montenegro, under Cypriot law, tax certificates are issued solely on the basis of a filing by the tax payer and the actual content of the filing is not investigated independently in any way. Therefore, just like a certificate of registered office does not create a registered office where none exists, likewise a tax residency certificate does not conclusively demonstrate that CEAC is a tax resident of Cyprus. The Tribunal can and should make its own determination on the matter.[139]

140. Referring to the expert testimony of Mr. Ioannides and the *Laerstate BV v. The Commissioner for Her Majesty's Revenue and Customs* decision,[140] Respondent contends that, under Cypriot law, tax residency requires that the legal entity's central management and control be located in Cyprus.[141]

141. According to Respondent, the evidence in the record demonstrates that CEAC was not effectively managed or financially controlled in Cyprus, and that it did not run its business in Cyprus at the time the Request for Arbitration was filed, i.e. March 2014. Respondent considers that the only evidence purportedly to the contrary are the tax residency certificates

[136] Rejoinder, at 141-148.
[137] Rejoinder, at 149-152.
[138] Markides Second Legal Opinion, at 4.2.
[139] Rejoinder, at 153-155.
[140] *Laerstate BV v. The Commissioner for Her Majesty's Revenue and Customs*, [Corporation Tax] [2009] UKFTT 209 (TC), at 27, Appendix 2 to Ioannides Second Legal Opinion.
[141] Rejoinder, at 156, 157.

and the certificates of registered office, which cannot be considered conclusive evidence of the matters stated therein.[142]

142. On the basis of all these considerations, Respondent concludes that CEAC does not have a "seat" in Cyprus, as required under Article 1(3)(b) of the BIT.

VII. THE TRIBUNAL'S ANALYSIS

143. The Tribunal has carefully considered the Parties' submissions and the evidence in the record with regard to the interpretation of the term "seat" under Article 1(3)(b) of the Treaty.[143] After deliberations, the Tribunal has come to the conclusion that CEAC did not have a "seat" in Cyprus at the relevant time. As a result, the Tribunal finds that CEAC is not an "investor" under the BIT, and the Tribunal therefore lacks jurisdiction to hear this case.

144. The Tribunal will explain this conclusion in the following sections.

A. Preliminary considerations

145. The starting point for the Tribunal's analysis is Article 41(1) of the ICSID Convention, which provides that the Tribunal shall be the judge of its own competence. This provision has several implications. The first is that the Tribunal has an obligation to determine its own jurisdiction. The second is that it is *only* the Tribunal that can make such a determination. Finally, the Tribunal being constituted under the ICSID Convention and the BIT, its jurisdictional analysis will be made under international law.

146. Further, the Tribunal notes that the condition of jurisdiction must be fulfilled at the moment when the Parties' consent to arbitration is perfected, i.e., at the moment the Request for Arbitration is filed (11 March 2014). This conclusion is reinforced by Article 25(2)(b) of the ICSID Convention, which requires that a juridical person claiming the protection of the Convention must have "the nationality of a Contracting State other than the State party to

[142] Rejoinder, at 158-164.
[143] In this regard, the Tribunal notes for the avoidance of doubt that the fact that a particular submission, argument, document or fact is not expressly addressed in this Award does not mean that it has not been carefully considered by the Tribunal.

the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration", i.e., the date when the Request for Arbitration was transmitted to the Centre. Therefore, the Tribunal has to determine whether Claimant had a "seat" in Cyprus on 11 March 2014.

147. The Tribunal is grateful to the Parties for their arguments concerning the correct interpretation of the term "seat" under Article 1(3)(b) of the BIT. While Claimant contends that the Tribunal should make a *renvoi* to Cypriot municipal law and find that the term "seat" means – with regard to Cypriot investors under the Treaty – "registered office", Respondent, on the other hand, is of the view that the Tribunal should seek to interpret the term "seat" autonomously under the Treaty and find that it means the place where a legal entity is effectively managed and financially controlled and where it carries out its business activities.

148. For the purposes of the present analysis, the Tribunal does not consider it necessary to determine the precise meaning of the term "seat" as employed in Article 1(3)(b) of the BIT. That is because the evidence in the record does not support a finding that CEAC had a registered office in Cyprus at the relevant time (*B.*), nor a conclusion that it was managed and controlled from Cyprus (*C.*). Equally, the Tribunal finds that the term "seat" cannot be equated to tax residency (*D.*). As these are the only competing interpretations of the term "seat" put forward by the Parties, the Tribunal has come to the conclusion that CEAC did not have a "seat" in Cyprus at the time the Request for Arbitration was filed. Consequently, CEAC is not an "investor" within the meaning of the Treaty, and the Tribunal lacks jurisdiction to hear this case.

149. The Tribunal will explain its finding in the paragraphs below.

B. Whether Claimant had a registered office in Cyprus on 11 March 2014

150. Claimant has argued throughout this arbitration that the existence of its registered office in Cyprus is "conclusively" proven by the certificates of registered office in the record. For example, it has stated:

> "CEAC's registered office is situated at Dimosthenous 4, 1101, Nicosia, Cyprus. This is confirmed by the official Certificate of Registered Office issued by the Registrar of Companies. The Certificate of Registered Office serves as conclusive evidence of the matters stated in it, including the presence of the registered office within Cyprus. On that basis, there can be no doubt that CEAC's seat is located in Cyprus".[144] [internal citations omitted] [emphasis added]
>
> "[…] CEAC (or its corporate predecessor) has maintained a registered office in Cyprus at all material times since at least 2005. This is conclusively evidenced by CEAC's certificates of registered office. As noted by Mr Markides in his First Expert Legal Opinion, there is no factor, other than the absence of a valid certificate of registered office, which can negate or invalidate the existence of a registered office of a company registered in Cyprus".[145] [internal citations omitted] [emphasis added]

151. Claimant's argument is consistent with the testimony of Mr. Markides, who stated as follows:

> "47. From the documents I have reviewed (including Exhibit C-6, Certificate of Incorporation of Salamon Enterprises Limited; and C-8, Certificate of Change of Name from Salamon Enterprises Limited to CEAC Holdings Ltd), I have no doubt that CEAC met the incorporation requirements under the Companies Law.
>
> 48. Furthermore, the documents I have reviewed (including Exhibit C-20, Certificate of Registered Office of Salamon Enterprises Limited and the recently obtained electronic confirmation concerning CEAC, attached hereto as **Appendix F**) and the fact that CEAC is still a registered company in the companies register of the Registrar of Companies in Cyprus, it is my opinion that CEAC has met and to date meets the registered office requirements under the Companies Law.
>
> 49. I would further note that other documents provided to me for the purposes of this opinion which contain the details of CEAC's registered office (such as official filings and correspondence) confirm that it is located at *"…* (in English: *"Dimosthenous 4, 1101, Nicosia, Cyprus"*).
>
> 50. The decisive document that confirms the existence and address of a registered office, however, is indeed the Certificate of Registered Office issued by the Registrar of Companies of Cyprus; the information therein corresponds to the information contained in the public file held by the Registrar. I am not aware of any factor, other than the absence of a valid Certificate of Registered Office, which can negate or invalidate the existence of a registered office of a company registered in Cyprus".[146][emphasis added]

152. The Tribunal has no difficulty accepting that, as a general matter, a certificate of registered office will indicate that a company indeed has a registered office at the address specified

[144] Memorial, at 62.
[145] Reply, at 154.
[146] Markides First Legal Opinion, at 47-50.

therein. However, the presentation of the factual evidence in this particular case has brought to light certain elements that have made the Tribunal doubt whether, as of the date of the Request for Arbitration, Claimant in effect had a registered office in Cyprus.

153. The Tribunal will set out these factual elements in more detail below, but before proceeding to this analysis (*2.*), the Tribunal finds itself compelled to first consider the issue of the probative value of a certificate of registered office or, more precisely, the precise extent of the facts which it certifies (*1.*).

1. The probative value of the certificate of registered office

154. In this context, the Tribunal wishes to reemphasize that the question of its jurisdiction is a matter for international, and not domestic, law. The Tribunal therefore has to determine the probative value *in the international legal order* of certificates of registered office issued by Cypriot (*i.e.,* domestic) authorities.

155. In line with earlier decisions of international tribunals, this Tribunal considers that certificates of nationality and, by corollary, other certificates issued by domestic authorities *insofar as they are relied upon by a claimant in order to justify the jurisdiction of international arbitration tribunals*, constitute only *prima facie* evidence of the facts they attest to. An international tribunal is therefore not bound by the nationality determinations and the certificates issued by domestic authorities, but must make its own determination under international law. This finding does not in any way diminish the probative value of such certificates under domestic law.

156. This Tribunal refers in this respect to the *Flutie* case:

> "[T]he Commission, as the sole judge of its jurisdiction, must in each case determine for itself the question of the citizenship upon the evidence submitted in that behalf. […] Whatever may be the conclusive force of judgments of naturalization under the municipal laws of the country in which they are granted, international tribunals, such as this Commission, have claimed and exercised the right to determine for themselves the citizenship of claimants from all the facts presented".[147]

[147] *Flutie* case, 1904 IX R.I.A.A., pp. 151, 152 ("*Flutie*") (Exhibit RL-102).

157. The *Soufraki v. UAE* annulment committee found, in a similar vein:

> "A certificate of nationality can, in principle, only be as correct as the information disclosed. The truth has to prevail over the formal appearance".[148]
>
> "[T]he principle is in fact well established that international tribunals are empowered to determine whether a party has the alleged nationality in order to ascertain their own jurisdiction, and are not bound by national certificates of nationality or passports or other documentation in making that determination and ascertainment".[149] [emphasis added]
>
> "[T]he Tribunal had the power to determine whether it had jurisdiction to hear the dispute. In determining whether the jurisdictional requirements of the ICSID Convention and the BIT have been satisfied, the Tribunal is empowered to make its own investigation into the nationality of parties regardless of the presence of official government nationality documents. Certificates of nationality constitute *prima facie* – not conclusive – evidence, and are subject to rebuttal".[150] [emphasis added]

158. The *Soufraki v. UAE* annulment committee was careful to emphasize that its findings were limited to a very narrow set of circumstances:

> "[P]rudential considerations require that the *ad hoc* Committee make crystal clear that it is addressing a very specific and limited situation: that is, the situation of an international tribunal vested with *competence-competence*, which must verify the reality of the claimed nationality of a natural person who is a party to a proceeding before it, if the Tribunal is to determine its own jurisdiction to go forward with that proceeding, when its jurisdiction is contingent upon that nationality. Further defining features of this situation are that the Claimant has presented certificates of nationality issued by local governmental or consular officials of the State whose nationality is claimed, under circumstances indicating that material error under the law of that State may have attended such issuances".[151] [emphasis added]

159. The circumstances to which the *Soufraki v. UAE* committee made reference are very similar to those present in the case before the Tribunal.

160. In any event, the Tribunal considers that, even under Cypriot law, certificates of registered office are not conclusive evidence that a registered office exists.

[148] *Soufraki v. UAE*, at 62.
[149] *Soufraki v. UAE*, at 64.
[150] *Soufraki v. UAE*, at 76.
[151] *Soufraki v. UAE*, at 78.

161. In this respect, the Tribunal notes that it has been provided with the conflicting testimonies of Messrs. Markides and Ioannides. While Mr. Markides has opined that a certificate of registered office represents "conclusive" evidence that a registered office actually exists, Mr. Ioannides has contested this interpretation of the Companies Law, stating that a certificate of registered office simply confirms that a company has made the required notification to the Registrar of Companies, and nothing more.

162. These two opinions could not be more irreconcilable. In deciding which of the two is preferable, the Tribunal has considered the bases invoked by the two experts for their positions.

163. Mr. Markides appears to ground his opinion on a presumption of good faith on the part of a company making the required filing with the Registrar of Companies and on the mandatory nature of the obligation to maintain a registered office. He specified in this respect:

> "1.5 I attach hereto as **Appendix 1** the English translation of section 102 of the Companies Law, as it has been amended on June 19, 2015 by Law No. 89(I)/2015. As shown therein, the obligation of a company to maintain a registered office in Cyprus and to make relevant reporting of it in its annual returns (Form HE 32(I) – copy (in Greek) of which is attached as **Appendix 2**), is a statutory compulsory requirement, which, if not complied with, may, according to the provisions of section 327(6) of the Companies Law, result in striking off from the Register of Companies. […]
>
> 3.1 The KI [Kypros Ioannides] Opinion also argues that a certificate of registered office, issued by the Registrar of Companies, does not constitute conclusive evidence that a company actually maintains a registered office in Cyprus.
>
> 3.2 I disagree with this argument and, as far as regards the comment made in the KI Opinion that the "*… Registrar does not carry out any independent investigation…*", I repeat the content of paragraph 1.5 above and furthermore note that the KI Opinion conclusion on this matter is based on an arbitrarily [sic] presumption that each company in Cyprus is acting against its legal obligations. I cannot accept as correct in law the conclusion of the KI Opinion that "*… a certificate of registered office merely confirms that a company has made a filing to the Registrar, not that it maintains a registered office …*" simply because the "*… Registrar does not carry out any independent investigation…*". Each company in Cyprus and its officers are considered to act in good faith when reporting to the Registrar of Companies the place of the "*registered office*".
>
> 3.3 In addition, the conclusion of the KI Opinion invalidates also other legal obligations of companies, such as those specifically described in paragraph 44 of the First Expert Opinion. I am not aware of any other certificate of proof, which can be issued by any other competent

> authority of Cyprus, other than the Certificate of Registered Address, which verifies and confirms the existence of a "*registered office*" in Cyprus".[152] [emphasis added]

164. Mr. Ioannides, on the other hand, bases his opinion on several facts, including: (i) that the Registrar of Companies does not undertake an independent investigation to verify if the filing made by a company corresponds with reality; and (ii) that a number of causes, apart from a lack of good faith of the company making the filing, could lead to a situation where the Registrar's records do not correspond with reality. In this respect, Mr. Ioannides testified in his First Legal Opinion:

> "12.2. I firstly note Mr Markide's [sic] position in his Opinion that a company's certificate of incorporation constitutes 'conclusive evidence' that it maintains a registered office or that a certificate of registered office is 'a decisive document that confirms the existence and address of a registered office'.
>
> 12.3. I respectfully disagree with Mr Markides that a company's certificate of incorporation constitutes evidence of any form (let alone conclusive evidence) that a company maintains a registered office.
>
> 12.4. Additionally, a certificate of registered office is not a 'decisive document which confirms the existence and address of a registered office'. Such a certificate merely confirms that a notification of a registered office has been made by a company to the Registrar of Companies. The Registrar does not carry out any independent investigation and the said certificate contains the words 'in accordance with the records kept by this Department'. Consequently, a certificate of registered office merely confirms that a company has made a filing to the Registrar, not that it maintains a registered office, which is an independent requirement".[153] [emphasis added]

165. Mr. Ioannides then provided supplementary clarifications during the hearing.

> "THE PRESIDENT: Is there any also [sic] verification by the office where it is registered? So you file the documents, is there any verification that is made?
> A. By the Registrar of Companies? No, there is no such verification.
> MR SPRANGE: The consequences could be serious in terms of anybody who has misled the register of companies.
> A. Potentially. Depending on the state of mind of the particular person.
> Q. The other consequence, of course, is if you don't have a proper registered office, you may be struck off as a company?
> A. Yes.
> […]
> MR SPRANGE: […] You said, in your second opinion, that the certificate of registered office is no evidence, let alone conclusive evidence.

[152] Markides Second Legal Opinion, at 1.5, 3.1-3.3.
[153] Ioannides First Legal Opinion, at 12.2-12.4.

> […]
> A. […] The certificate of registered office only confirms that the filing has been made. No independent review is made, so that anybody can confirm that the company maintains a registered office.
> MR SPRANGE: So you say the filing of one of these certificates, which is part of a bundle that is filed by a lawyer, and has consequences if it's wrong, is no weight as to the existence of a registered office?
> A. Correct.
> Q. No evidence at all?
> A. If you look at the wording of the certificate itself, it says something along the lines that in accordance with the records kept by this department, the registered office of the particular company lies at the following, so even the certificate does not verify that the company maintains a registered office. It says in accordance with the records, the filings made with us, this is what we have.
> […]
> There could be a negligent or a non-negligent intention to mislead by filing a wrong filing, but it could be a negligent filing, with a wrong address. It could be a negligent replication of the form by the Registrar of Companies. There could be a destruction of building, for whatever reason […]. The company could move, but still not notify the registrar of such a move. So any of many things could happen regarding the actual maintenance of a registered office.
> I insist in my statement that a certificate of registered office merely confirms that the filing by the company has been made, that it maintains a registered office somewhere. That is all the evidence it provides".[154] [emphasis added]

166. While the Tribunal has no reason to doubt that, as testified by Mr. Markides, in the vast majority of cases, a company's registered office will be at the address indicated in the certificate of registered office, the Tribunal cannot fail to note that Mr. Markides has never rebutted Mr. Ioannides' testimony that the Registrar of Companies, upon receiving a filing by a company, does not carry out any official and independent verification as to whether the declaration made by the company concerning the registered office corresponds with reality. Furthermore, Mr. Markides has offered no clarifications for the situations – which could arise in practice – where for reasons unrelated to bad faith (such, as for instance, a change in a company's registered office coupled with a failure to notify; or the destruction of the building), the Registrar's records do not correspond with reality.

167. In addition, the Tribunal notes that, as testified by Mr. Ioannides, the certificates of registered office produced by Claimant by their own words do not attest to the *actual existence* of a

[154] Tr., Day 1, 173:10-22, 174:12-14, 175:2-19, 176:13-25, 177:1.

registered office at the address indicated therein. The certificates indicate what the records kept by the Registrar attest to. In this respect:

> Exhibit C-20, dated 29 August 2005:
>
> > "It is hereby certified that, in accordance with the records kept by this Department [Ministry of Commerce, Industry and Tourism, Department of Registrar of Companies and Official Receiver Nicosia], the Registered Office of the above Company is situated at:
> >
> > Dimosthenous, 4
> > P.C. 1101, Nicosia, Cyprus"
>
> Exhibit C-95, dated 29 October 2010:
>
> > "It is hereby certified that, in accordance with the records kept by this Department, the Registered Office of the above Company is situated at:
> >
> > Dimosthenous, 4
> > P.C. 1101, Nicosia, Cyprus"
>
> Exhibit C-56, dated 16 December 2011:
>
> > "It is hereby certified that, in accordance with the records kept by this Department, the Registered Office of the above Company is situated at:
> >
> > Dimosthenous, 4
> > P.C. 1101, Nicosia, Cyprus"[155] [emphasis added]

168. Consequently, the Tribunal considers that Mr. Ioannides' more nuanced testimony better reflects the effects of Cypriot law. The Tribunal therefore finds that, under Cypriot law, a certificate of registered office is not conclusive evidence of the existence of a registered office, but merely confirms that a filing to this effect has been made.

169. Having concluded that, under both international law and Cypriot law, a certificate of registered office does not represent conclusive evidence that a registered office exists at the address identified therein, the Tribunal will therefore have to determine whether the evidence

[155] Claimant has also put forward: Exhibit C-57, which is not an actual certificate, but a print-out from the Department of Registrar of Companies and Official Receiver; certificates of incumbency; and certificates of registration. The Tribunal finds that these documents, as reflected in their very titles, are not certificates of registered office and could not attest to the probative value of such a certificate.

in the record supports a finding that CEAC maintained a registered office in Cyprus in March 2014. As indicated above, the Tribunal has come to the conclusion that it did not.

2. CEAC did not have a registered office in Cyprus in March 2014

170. To begin with, the Tribunal refers below to the expert testimonies of Mr. Ioannides and Mr. Markides in order to ascertain the conditions that need to be fulfilled so that an office could qualify as a registered office under Cypriot law.

171. In this respect, the Tribunal finds that Mr. Ioannides' testimony below to be particularly useful:

> "3.9. There are in my view certain minimum requirements that an office should fulfil if it is to be considered to be a company's registered office within the meaning of the Companies Law, including:
>
> (a) It must consist of a physical premises – a vacant plot will not do;
>
> (b) The company must have some right (by way of ownership, lease or license) to use the property or part thereof – it cannot be a trespasser (although the premises may be shared with any number of other persons – whether legal or natural);
>
> (c) The premises must be accessible to the public (for at least two hours on each business day) for inspection of the various books and registers (which are discussed at length in both of Mr Markides' Opinions) and for service of documents and notices upon the company;
>
> (d) The books and registers that a company must by law maintain in its registered office should actually be held there; and
>
> (e) The relevant company's name should be painted or affixed on the outside of the office, in a conspicuous position, in letters easily legible.
>
> If an 'address' does not comply with the above minimum requirements, I do not see how such address can qualify as the registered office of any company".[156] [internal citations omitted] [emphasis added]

172. Therefore, the Tribunal will consider below if these conditions are fulfilled.

[156] Ioannides Second Legal Opinion, at 3.9.

173. Physical premise. Both Parties agree and the evidence has revealed that the address where Claimant states that it has its registered office is a building located at 4 Dimosthenous, Nicosia, Cyprus.

174. Right to use the property. Based on the evidence in the record, the Tribunal cannot determine whether CEAC has the right to use the property situated at 4 Dimosthenous, Nicosia, Cyprus as a registered office.[157]

175. Accessibility to the public. The Tribunal refers in this respect to Mr. Ioannides' testimony, according to which the Companies Law provides for specific rights of access and inspection of a company's documents:

> "(i) The register of debentures: Should be open to inspection daily from holders of debentures and company members without fee and any other person at a prescribed fee for at least two hours daily (it may be closed only during such period or periods, not exceeding in the whole thirty days in any year);
>
> (ii) Register of charges and book of mortgages: Should be open for not less than two hours during business hours daily to the inspection of any creditor or member of the company without fee, and the register of charges and book of mortgages shall also be open to the inspection of any other person on payment a [sic] prescribed fee;
>
> (iii) Register of Members: Should be open to inspection daily from company members without fee and any other person at a prescribed fee for at least two hours daily (it may be closed only during such period or periods, not exceeding in the whole thirty days in any year);
>
> (iv) Minutes of proceedings of general meeting [sic]: Should be open to inspection daily from company members without fee; and
>
> (v) Register of directors and secretaries: Should be open to inspection daily from company members without fee and any other person at a prescribed fee for at least two hours daily".[158] [internal citations omitted]

176. The Tribunal finds that Mr. Ioannides' testimony is consistent with the provisions of Sections 84(1), 100(1), 108(1), 140(1) and 192(6) of the Companies Law. Mr. Ioannides'

[157] The Tribunal does not rely on this specific point for its conclusion that CEAC does not have a registered office in Cyprus, as neither Party has focused on CEAC's right (or lack thereof) to use the property.
[158] Ioannides First Legal Opinion, at 12.5.(b).

testimony explaining what books and registers are required by law to be kept at a company's registered office is also in line with that of Mr. Markides:

> "44. The registered office of a company serves various mandatory purposes. In particular, it is the place where the company shall keep:
>
> 44.1 the register of holder [sic] of debentures (section 83);
>
> 44.2 every instrument creating any charge requiring registration or any mortgage requiring recording (section 99);
>
> 44.3 the register of its members (section 105);
>
> 44.4 the book containing the minutes of proceedings of any general meeting (section 140);
>
> 44.5 the books of account (section 141);
>
> 44.6 the register of its directors and secretaries (section 192).
>
> 45. Furthermore, the registered office is the place to which all communications and notices may be addressed and served. The Companies Law also confers special jurisdiction on the District Court where the registered office of a company is situated, for (among other things) winding-up procedures and cross-border mergers (section 209)".[159]

177. The Tribunal further notes that Respondent has introduced into the record exhibits and witness testimonies showing that, on several distinct instances, the building situated at 4 Dimosthenous, Nicosia, was not accessible to the public and appeared to show no sign of CEAC's presence or of any activity.

178. The first evidence in this respect was filed during the stage of the proceedings dedicated to Respondent's Preliminary Objections (Exhibits R-1, R-2 and R-3).

179. Exhibits R-1 and R-2 are two emails from DHL and FedEx reporting on two separate instances of delivery failures to the address CEAC has indicated as its registered office:

> Exhibit R-1:
>
> > "The shipment in question was collected by a DHL courier on 30 January 2014 for delivery to the recipient CEAC Holding limited, Dimosthenous,4, P.C. 1101, Nicosia, Cyprus. According to information which we obtained from our colleagues at DHL Cyprus, the shipment in question was sorted on arrival, but was not delivered

[159] Markides First Legal Opinion, at 44, 45.

> as the recipient was not found at the given address and no telephone number was listed on the waybill". [emphasis added]

Exhibit R-2:

> "We write to you with regard to the shipment under AWB# 803675203787 which you sent on 6 February 2014 via the FedEx courier service to recipient:
> CEAC HOLDINGS LTD
> DIMOSTHENOUS 4
> NICOSIA
> Cyprus
> The shipment arrived in Cyprus on 9 February and was dispatched for delivery the following day.
> The same day we were informed that the recipient is not known at that address". [emphasis added]

180. Exhibit R-3 is an email from Petros Antoniades to Tanja Sumar dated 11 August 2014. Within this email, Mr. Antoniades, who had been tasked by Respondent to see the property, made the following observations:

> "Based on your request to check the registered address of the named company, provided as 4 Dimosthenous Street, Nicosia 1101, we have visited this address today 11/8/2014 at 9:30 in the morning and at 14:30.
> […]
> Although there was no number on the suspected houses number 4, we have been able to trace this. The house entrance was closed and there was no obvious sign or brass plate mentioning any company and there was no obvious activity of people entering or exiting. Furthermore, there were a number of letters/marketing leaflets on the entrance that looked to have been there for some time.
> […]
> There is definitely no sign of the company you are interested to have an active presence there [sic]. […] We seriously doubt any physical activities of any company within the premises". [emphasis added]

181. In light of the filing of these three documents into the record and the subsequent proceedings dedicated to Respondent's Preliminary Objections under Arbitration Rule 41(5), the Tribunal considers that Claimant was put on notice that it needed to provide evidence to demonstrate the existence of its "seat" in Cyprus. Claimant was also aware that Exhibit R-3 highlighted a number of issues concerning the building situated at 4 Dimosthenous, Nicosia, which appeared to suggest that the building was not being used by CEAC, that it was not used for any commercial activity and was unoccupied. During the hearing dedicated to

Respondent's Preliminary Objections, Claimant made specific representations that it would file a substantial amount of evidence to prove its case:

> "PROFESSOR STERN: […] If the Tribunal takes your facts, what can we do with those facts? We take your facts as, you know, we agree, it's all right, that is your facts [sic], we accept them, but what can we do with facts dating back to 2006?
> MS VASANI: I will take you to all the documents in a minute. All of our evidence is not limited to 2006. In fact, you will see that –
> […]
> We gave a sampling of documents, and actually the documents that we gave span from the beginning of the corporation all the way to the end of the corporation and I will take the Tribunal through those because there are more recent documents, there were more recent resolutions issued before the RFA was filed, there are hundreds of documents, and again, we didn't think that at the 41(5) stage it was appropriate to have a full-blown ICSID jurisdictional hearing and proceeding".[160] [emphasis added]

182. Based on these representations, the Tribunal expressly indicated in its Decision on Respondent's Objections under Rule 41(5) of the ICSID Arbitration Rules that:

> "During this subsequent stage of the proceedings, the Parties are to present all the evidence and arguments that pertain to the issue of the "seat", in particular the definition, scope and content of the term "seat" as used in the Treaty, and the Tribunal will issue a ruling accordingly".[161] [emphasis added]

183. The Tribunal re-emphasized the importance it attached to the provision of sufficient and persuasive evidence in Procedural Order No. 2 and set the procedural calendar on the assumption that Claimant had substantial amounts of evidence to produce:

> "In light of Claimant's assertion that it has substantial amounts of evidence to produce in support of its contention that it has a "seat" in Cyprus, it is likely to be more efficient for Claimant to produce this evidence first, together with its memorial on the issue of "seat", so that the Tribunal and the Respondent can properly be guided by it".[162] [emphasis added]

184. Demonstrating that the building situated at 4 Dimosthenous, Nicosia, served as CEAC's registered office in fact and not just on paper would have been relatively easy for Claimant, if it was indeed its registered office. With little to no difficulty, Claimant could have produced factual evidence dispelling any doubts that CEAC effectively had an office at that

[160] Preliminary Objections Hearing Transcript, 107:2-8, 11-20.
[161] Decision on Respondent's Objections under Rule 41(5) of the ICSID Arbitration Rules, at 110.
[162] Procedural Order No. 2, at 6.iii.

address, where the company could be contacted[163] and its registers could be consulted by the public. It did not.

185. Instead, during the proceedings dedicated to the issue of "seat", the Tribunal heard testimony consistent with what is recorded in Exhibit R-3.

186. Indeed, together with its Counter-Memorial, Respondent introduced the witness testimony of Mr. Marcos Gregorios Dracos, who made the following statements:

> "11. Upon request from the legal counsel of the Respondent, on 23 September 2015 at approximately 9.15am I visited the building at the above address (the **"Property"**). The Property appeared not to be occupied. There was no sign or plate bearing CEAC's name on the Property. The Property simply looked like an unoccupied house, and there was nothing to indicate or suggest that it was used as offices by CEAC. My visit had a duration of 15 minutes.
>
> 12. Upon further request from the legal representatives of the Respondent, on 30 September 2015, at approximately 3.15pm I visited again the Property. Its condition was still as described in paragraph 11, above, except that there were also some flyers on the front outer gate.
>
> 13. I entered through the outer gate, into the yard of the Property, approached the front door and rang the doorbell. I also knocked on the front door. No one answered. Since the front door is partly made of translucent glass, I could see inside the Property, which looked unoccupied. I could see an old couch (with some pillows and a walking stick lying on it), a folded rug, a box and some objects I could not identify what they were.
>
> 14. The Property has in total four entrance doors: a front door on the ground floor, a front door on the first floor, and two front doors next to each other, on the side. I rang the bell or knocked on all of them, but no one answered. It was therefore, impossible to obtain access to the inside of the Property. Since it was impossible to obtain access, I could not inspect or check any company registers. My visit lasted 20 minutes.
>
> 15. I also confirm that CEAC has not notified the Registrar that its registers of members and debentures can be inspected at any other address".[164] [emphasis added]

187. Again, it would have been relatively easy for Claimant to introduce into the record, together with its Reply, evidence that contradicted the testimony of Mr. Dracos, if it existed. It did not.

[163] For further observations with regard to CEAC's amenability to service, please see below, at paragraphs 195 et seq.
[164] Dracos Witness Statement, at 11-15.

188. Respondent then introduced the testimony of Mr. Michalis Georgiou, who stated as follows:

> "2. I visited the Property on three consecutive days (15, 16 and 17 December 2015) at three different times in each day (10:00, 11:30 and 15:00).
>
> 3. Following my visits to the Property, I note the following:
>
> a. The Property contains a two storey building (which appears to be a house) and is located in a residential area.
>
> b. There are three gated entrances to the Property, two of which are driveways. One of the driveways was securely locked with a chain. Leafs and debris made the said driveway inaccessible. The second driveway, while not locked, had a chain hanging from one of its gates. The third entrance was not locked or somehow else secured.
>
> c. Although I spent circa 10 minutes during each of my visits, no one seemed to enter or exit the Property or the house. From what I could observe without entering the Property there was no movement inside the Property or the house.
>
> d. Although during my last visit it was really clouded with very little natural light, no artificial light seemed to be in use in the Property or the house.
>
> e. There was no sign or other marking visible from outside the Property.
>
> f. While I did not attempt to get access to the property it appeared clear to me that no one was there and that, therefore, it would not be possible to ask anyone whether any registers of any company could be inspected".[165] [emphasis added]

189. During the hearing, Claimant sought to demonstrate that these testimonies had very little evidentiary value, because Messrs. Dracos and Georgiou could not obtain access to the company's registers due to the specific nature of the instructions they received. Claimant submitted on several occasions during the hearing that, if the witnesses desired to consult CEAC's registers, the appropriate thing to do was to fix an appointment.

190. While the Tribunal accepts that, under ordinary circumstances, this may well be the best course of conduct, the special circumstances of this case suggest otherwise. Indeed, the evidence produced up until the hearing had revealed that, on several different occasions, the building situated at 4 Dimosthenous, Nicosia, appeared unoccupied, was inaccessible to the public and showed no sign of any activity. Moreover, as mentioned earlier, the Companies Law effectively requires any company registered in Cyprus to have its registers available for

[165] Georgiou Witness Statement, at 2, 3.

inspection by any person daily. The Tribunal notes in this respect the clarifications made by Mr. Dracos during the hearing:

> "Q. As I understand your statement, your instructions were to go there and to see if anybody was there?
> […]
> A. […] [O]n the 23rd I was asked to go and check the factual position in relation to the property, and then on the 30th I was actually asked to try and gain access to the property for the purpose of checking the register of members and debentures.
> […]
> Q. If it is not a civil fraud investigation, and you are really just trying to sincerely see the company's register and you haven't made an appointment and you turn up and somebody is not there, might you leave a card […] or make an appointment next time you go? […]
> A. […] No, I mean, I wouldn't leave a business card because I would have serious doubts whether anyone would actually pick it, from the state of the house […]. Though again, as I said, I am reluctant to engage in legal speculation, but the reason one usually goes to the registered office without giving prior notification is that the books should be there, unless a notification has been sent, and they should be available for certain hours of the day".[166] [emphasis added]

191. Claimant has not offered any plausible explanation for the state of the building, which appeared unoccupied, for the lack of any outside indication that it is being used for business purposes by CEAC and, more importantly, Claimant has not provided a reason why, on nine different occasions during the last two years, the building was inaccessible for courier delivery or for purposes of inspecting CEAC's registers. Under normal circumstances, any company should have had no difficulty finding and introducing into the record evidence that the building is in use, is the place where its registers are kept and that it is open to the public.

192. The only evidence that Claimant did provide was introduced during the Preliminary Objections phase and appears to suggest that, indeed, CEAC's registers are not accessible to the public as required by law. Instead, it appears that an employee of the law firm Chrysanthou & Chrysanthou LLC regularly picks up the correspondence from 4 Dimosthenous, Nicosia, to deliver it to the offices of the law firm. No activity is mentioned as actually taking place at 4 Dimosthenous, Nicosia. Moreover, CEAC's operating address

[166] Tr., Day 2, 74:7, 8, 75:6-10, 81:2-12, 21-25, 82:1.

is the same as the address of Chrysanthou & Chrysanthou LLC and of C & P Corporate Services Limited:

> "[A]n employee of our firm forwards on a daily basis all of the correspondence received at the Registered Address to the firm's address […]. […] I note that CEAC's operating address is not the same as its Registered Address. CEAC carries out its operational business at Palais d'Ivoire House, 2nd Floor, 12 Them. Dervis Ave., PO Box 21762, CY-1513 Nicosia, Cyprus […]. This is the address of our firm, where CEAC's corporate director CPCS and CPCS' director Ms Antoniou are located".[167]

193. Taking all of these findings into consideration, the Tribunal can only conclude that CEAC's office at 4 Dimosthenous, Nicosia does not meet the requirement specified in the Companies Law that it should be accessible to the public for purposes of inspecting the company's registers.

194. Amenability to service. Another condition mentioned by Mr. Ioannides so that an office can qualify as a registered office under Cypriot law is amenability to service. This is consistent with Section 102(1) of the Companies Law (in force at the relevant time), which provides:

> "A company shall, as from the day on which it begins to carry on business or as from the fourteenth day after the date of its incorporation, whichever is the earlier, have a registered office in the Republic to which all communications and notices may be addressed". [emphasis added]

195. It is unclear whether the property located at 4 Dimosthenous, Nicosia, is still being used for service of documents and notices upon CEAC. The Tribunal accepts that Claimant has received correspondence at that address for a number of years, including correspondence from Respondent.[168] However, the Tribunal notes that Exhibits R-1 and R-2 demonstrate that, on two distinct occasions in 2014, two different courier services failed to effect delivery because "the recipient was not found at the given address"[169] or because "the recipient is not known at that address".[170] During the Preliminary Objections phase of these proceedings, Claimant produced the witness testimony of Mr. Chrysanthou, who stated that CEAC took regular deliveries from both DHL and FedEx at the registered office and could not find an

[167] Witness Statement of Nicos Chrysanthou, at 22, 24.
[168] Exhibits C-23-C-29 and C-31-C-39.
[169] Exhibit R-1.
[170] Exhibit R-2.

explanation for the two failed deliveries.[171] Mr. Chrysanthou further stated that "we[172] have established long-term engagement agreements with DHL (and FedEx in the past) who therefore are both quite familiar with all our different addresses and have faced no problems in delivering packages to us in the past".[173]

196. In light of this longstanding agreement with DHL (and FedEx), with both courier services being familiar with the address, the Tribunal can only assume that both DHL and FedEx did not make inaccurate representations when they stated that "the recipient was not found at the given address"[174] and that "the recipient is not known at that address".[175] Further, the Tribunal notes that the most recent correspondence sent to 4 Dimosthenous, Nicosia, that is on the record dates from 16 April 2013. Again, it would have been easy for Claimant to introduce into the record evidence demonstrating that correspondence can still successfully be delivered to CEAC in March 2014, if this was the case. It did not.

197. The actual presence of a company's registers at the registered office. Based on the evidence currently in the record, the Tribunal cannot determine whether CEAC's registers are actually kept at the registered office or not. Claimant has not produced evidence to this effect.

198. CEAC's plate. It is undisputed that the building at 4 Dimosthenous, Nicosia, does not bear CEAC's plate in a conspicuous and visible location.[176]

199. The Tribunal has therefore found that Claimant has not proven, with evidence, that the building at Dimosthenous 4, Nicosia, Cyprus is accessible to the public for purposes of inspecting the company's registers, that CEAC is amenable to service at that address, that the company's records are kept there or that the address bears a plate with CEAC's name.

[171] Witness Statement of Nicos Chrysanthou, at 19, 20.
[172] It is unclear from the witness statement of Mr. Chrysanthou whether "we" refers to CEAC or to the law firm where Mr. Chrysanthou is partner, Chrysanthou & Chrysanthou LLC.
[173] Witness Statement of Nicos Chrysanthou, at 21.
[174] Exhibit R-1.
[175] Exhibit R-2.
[176] Tr. Day 2, 64:18-25, 65:1-4.

200. Based on these considerations, the Tribunal can only conclude that, for purposes of its jurisdictional analysis, CEAC does not have a registered office at Dimosthenous 4, Nicosia, Cyprus. Considering that Claimant has not presented arguments or evidence indicating that a different address in Cyprus could ostensibly serve this purpose, the Tribunal concludes that CEAC did not have a registered office in Cyprus at the time the Request for Arbitration was filed.

201. In light of the fact that it seems undisputed that Claimant's interpretation of the term "seat", meaning "registered office", requires the fulfilment of fewer conditions than Respondent's proposed interpretation does, the Tribunal's finding that CEAC did not have a registered office in Cyprus at the relevant time is sufficient for a conclusion that CEAC is not an "investor" under the Treaty and the Tribunal has no jurisdiction.

202. Out of an abundance of caution, however, the Tribunal will consider below whether the evidence in the record supports the conclusion that CEAC was managed and controlled from Cyprus, which corresponds to Respondent's definition of "seat". Again, as mentioned earlier, the Tribunal finds that this is not the case.

C. Whether Claimant was managed and controlled from Cyprus in March 2014

203. Before proceeding with its analysis on this point, the Tribunal would like to reiterate that since the stage of the proceedings dedicated to Respondent's Preliminary Objections, Claimant has been asked to submit recent evidence attesting to the existence of CEAC's seat in Cyprus. In turn, Claimant has represented that it had in its possession numerous recent documents that would prove the existence of a "seat" in Cyprus. [177]

204. During the hearing dedicated to the issue of "seat", it became apparent that CEAC's status as a holding company is disputed by the Parties. However, even if the Tribunal were to assume that CEAC is a holding company, the record is very poor when it comes to evidence attesting to CEAC's management.

[177] Preliminary Objections Hearing Transcript, 107:2-8, 11-20.

205. In this respect, during the stage of the proceedings dedicated to Respondent's Preliminary Objections, Claimant filed Exhibits C-1 to C-58. Out of these exhibits, the following attest to CEAC's management:

> Exhibit C-46, Minutes of the Extraordinary General Meeting of Salamon Enterprises Ltd, 5 September 2005
>
> Exhibit C-47, Minutes of the Board of Directors of Salamon Enterprises Ltd, 4 May 2006
>
> Exhibit C-48, Minutes of the Board of Directors of Salamon Enterprises Ltd, 25 September 2006.

206. During the stage of the proceedings dedicated to the issue of "seat", Claimant has produced the following additional documents pertaining to the management of CEAC:

> Exhibit C-63, Written Resolutions of the Sole Director of Salamon Enterprises Ltd, 25 November 2005
>
> Exhibit C-64, Written Resolutions of the Sole Director of Salamon Enterprises Ltd, 25 November 2005
>
> Exhibit C-65, Written Resolutions of the Sole Director of Salamon Enterprises Ltd, 25 November 2005
>
> Exhibit C-79, Written Resolution of the Sole Director of Salamon Enterprises Ltd, 5 March 2007

207. Despite Claimant's representation that it had in its possession "hundreds of documents", including more recent resolutions, no other more recent documents attesting to the management of CEAC in Cyprus were submitted to this Tribunal. Providing such documents would have been easy for Claimant to do, if they existed. The Tribunal can only take note that there are no documents in the record attesting to CEAC's management and control at the relevant time: 11 March 2014.

208. The Tribunal therefore finds that CEAC does not meet the definition of "seat" put forward by Respondent.

D. Whether "tax residency" in Cyprus is equivalent to "seat" under the BIT

209. Claimant has put forward an alternative argument in support of its position that it has a "seat" in Cyprus: its alleged tax residency in the country. While the Parties dispute whether Claimant is in fact a tax resident in Cyprus, the Tribunal need not address this issue. Indeed, after a careful analysis of the Parties' arguments and evidence, the Tribunal has come to the conclusion that, under Cypriot law, "seat" cannot be equated with "tax residence".

210. In this respect, the Tribunal notes that Claimant has adduced no convincing evidence that tax residency could be equated with "seat" under Cypriot law. To the contrary, its own Cypriot law expert strongly disagrees with this position. Mr. Markides testified that Cypriot tax legislation is to be strictly interpreted, in light of its own context, and cannot be used to determine the meaning of the term "seat" under the BIT:

> "4.2 Resorting to the provisions of tax legislation of Cyprus for the purposes of this opinion[178] is inappropriate and may dangerously mislead the Tribunal. It is a rather well established Cypriot case law principle that the primary objective of tax laws is to ensure revenues for the Republic, by defining in various manners the behaviour of persons, aiming to secure effective achievement of the aforesaid primary objectives. As it has been repeatedly stated by the Supreme Court of Cyprus …, tax legislation shall be interpreted strictly within the context of its own wording.
>
> […]
>
> 4.4 The content of paragraph 15.5 of the KI Opinion, which refers to a specific passage of the OMAS judgment of the Supreme Court, although not accurately and completely translated, nevertheless strengthens my opinion that the provisions of tax legislation cannot be of assistance.
>
> 4.5 For the purposes of clarity and in support of my immediately above judgment, I hereinbelow set the original Greek text of paragraph 4 of the OMAS judgment delivered by Judge Constantinides. […]
> English Translation: "… Section 10 of the Law, concerns exactly when a person, **for the purposes of Section 9**, is considered to be in Cyprus. And it is obvious from the wording and its general meaning that the reference to ["έδρα"] does not merely refer to registered ["έδρα"]. It constitutes ascription of a respective English term **with wider meaning**, referring to the place of carrying on business. Hence, the article itself, **in its own meaning**, regulates circumstances, where a "person" may have ["έδρα"] in Cyprus and elsewhere…" (Emphasis added)

[178] According to Mr. Markides, the purpose of his opinion was to "explain, from the perspective of a Cypriot lawyer, the meaning of the term "seat" as it appears in Article 1(3)(b) of the [BIT]" (Markides First Legal Opinion, at 6).

> 4.6 It is obvious from the wording of the above passage of the Supreme Court Judgment that Section 10 (of the tax law referred to therein) was enacted specifically, in order to supplement and support the purpose of the special tax provisions of section 9 of the same Law."[179] [emphasis in the original]

211. The Tribunal therefore concludes that, regardless of whether Claimant is a tax resident of Cyprus or not, its tax residency cannot serve to prove that CEAC has a "seat" in Cyprus for purposes of Article 1(3)(b) of the BIT.

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212. For all these reasons, the Tribunal concludes that CEAC is not an "investor" in accordance with the terms of Article 1(3)(b) of the Treaty. Consequently, the Tribunal lacks jurisdiction to hear this case.

213. The Tribunal will now address the issue of the costs of this arbitration.

VIII. COSTS

A. Claimant's costs

214. Claimants requests that the Tribunal order Montenegro to pay all costs and fees associated with this phase of the proceedings, plus compound interest.

215. CEAC requests that it be awarded USD 2,530,931.63 as counsel fees and disbursement broken down as follows:

- USD 327,825.81 King & Spalding fees for the period 18 December 2013 until 31 August 2014;
- USD 464,239.39 King & Spalding fees for the period 1 September 2014 until 31 December 2014;
- USD 1,738,866.43 King & Spalding fees for the period 1 January 2014 to 31 March 2016.[180]

[179] Markides Second Legal Opinion, at 4.2, 4.4-4.6.
[180] C-CS, p. 10.

B. Respondent's costs

216. Respondent requests that the Tribunal order Claimant to bear the costs of the arbitration, including the fees and expenses of the Tribunal members and of ICSID, as well as all legal representation and other costs incurred by Respondent, plus interest in an amount to be determined by the Tribunal.[181]

217. Respondent argues that the Tribunal has discretion in determining the apportionment of the costs and that the circumstances of this case militate in favor of applying the principle *costs follow the event*. First, Respondent submits that the cost intensive stage of the proceedings dedicated to the issue of "seat" was only triggered as a result of Claimant's representation that it had hundreds of documents which could not be properly aired at the Preliminary Objections phase. However, the hearing has revealed that Claimant only introduced a handful of additional documents into the record, which could not demonstrate that it had a "seat" in Cyprus. In addition, Claimant unsuccessfully sought to disqualify Prof. Stern purely to drive up the costs of the arbitration. Finally, Respondent submits that the *costs follow the event* principle has been gaining considerable acceptance in investment arbitration.[182]

218. In the alternative, Respondent submits that, regardless of whether it prevails on the question of jurisdiction, the Tribunal should apply Arbitration Rule 28(1)(b) and decide that Claimant should bear the costs of these parts of the arbitration as a result of its conduct throughout these proceedings.[183]

219. Montenegro requests that it be awarded EUR 865,678.51 as legal fees and expenses (EUR 158,572.8 incurred in connection with the Preliminary Objections phase; EUR 26,480.83 incurred in connection with the challenge of Prof. Stern; and EUR 680,624.88 incurred in connection with the determination of the issue of "seat"), and USD 299,950 as arbitration expenses, plus interest.[184]

[181] R-CS, at 38.
[182] R-CS, at 13-23.
[183] R-CS, at 24-27.
[184] R-CS, at 28, 29, 36.

C. The Tribunal's analysis

220. Article 61(2) of the ICSID Convention confers the Tribunal discretion in the allocation of costs. In deciding how to allocate the costs of these arbitration proceedings, the Tribunal has been guided by the principle that costs should follow the event, if there are no indications that a different solution is better suited to the case at hand.

221. The Tribunal has found no such indications to be present in this case. In this respect, the Tribunal finds that the stage of the proceedings dedicated to the issue of "seat" has been triggered by Claimant's representation that it had substantial amounts of evidence to produce in support of its argument that it had a "seat" in Cyprus. As the Tribunal has already found several times within the body of this Award, Claimant has produced little evidence during this stage of the proceedings. This evidence was in any event not sufficient to prove its case regardless of how the Tribunal might interpret the term "seat" under Article 1(3)(b) of the BIT. The Tribunal has also taken into account that it previously dismissed Respondent's Preliminary Objections in light of the fact that it had not been briefed to its satisfaction by both Parties on the meaning of the term "seat" and on several factual issues.

222. The Tribunal has therefore decided that Claimant shall bear the costs of these arbitration proceedings, including the fees and expenses of the Tribunal and the Tribunal's Assistant, ICSID's administrative fees and direct expenses, amounting to (in USD):[185]

Arbitrators' fees and expenses	
Professor Hanotiau	90,867.90
Professor Park	100,258.75
Professor Stern	100,850.80
Ms. Iancu' fees and expenses	23,665.27
ICSID's administrative fees	96,000.00

[185] The ICSID Secretariat will provide the parties with a detailed Financial Statement of the case account once all invoices are received and the account is final.

Direct expenses (estimated)[186]	34,482.60
Total	**446,125.32**

223. The above expenses have been paid out of the advances made by the Parties in equal parts.[187] As a result, each Party's share of the costs of arbitration amounts to USD 223,062.66, and Claimant is to reimburse Respondent's share of the costs.

224. The Tribunal has further decided that Claimant shall also reimburse Respondent the amount of EUR 707,105.71 (representing Respondent's legal costs and expenses of EUR 865,678.51, minus the costs and expenses incurred in connection with the Preliminary Objections phase, of EUR 158,572.8).

225. The Tribunal notes that Respondent has requested that it be granted interest on any costs awarded to it. However, Respondent has not provided any arguments or evidence in support of its claim. The Tribunal therefore denies Respondent's claim for interest.

IX. DECISION

226. For the reasons set out above, the majority of the Tribunal:

(1) Finds that CEAC does not have a "seat" in Cyprus and does not qualify as an "investor" for purposes of Article 1(3)(b) of the BIT;

(2) Finds that the Tribunal lacks jurisdiction to hear this case;

(3) Decides that CEAC shall bear the full costs and expenses incurred by ICSID in connection with these arbitration proceedings, including the fees and expenses of the members of the Tribunal and of the Tribunal's Assistant, by reimbursing Montenegro USD 223,062.66;

[186] This amount includes estimated charges (courier, printing and copying) in connection with the dispatch of this Award.
[187] The remaining balance will be reimbursed to the parties in proportion to the payments that they advanced to ICSID.

(4) Decides that CEAC shall reimburse Montenegro the amount of EUR 707,105.71, representing Montenegro's legal costs and expenses minus the legal costs and expenses incurred in connection with Montenegro's Preliminary Objections;

(5) Dismisses all other claims.

William W. Park

Professor William W. Park
Arbitrator
Subject to the attached Separate Opinion

Date: 20 July 2016

Brigitte Stern

Professor Brigitte Stern
Arbitrator

Date: 18 July 2016

Professor Bernard Hanotiau
President of the Tribunal

Date: 9 July 2016

CEAC v. Montenegro
Separate Opinion of William W. Park

I. Notions of Registered Office

1. The Award declines to determine the meaning of "seat" in the 2005 investment treaty concluded by Cyprus with Serbia and Montenegro, yet nevertheless finds that CEAC has no seat in Cyprus, dismissing all claims and ordering CEAC to bear full costs. The Award reasons that the record fails to support a finding of seat according to any interpretation put forward.

2. In reaching that conclusion, the Award purports to consider Claimant's position on registered office, but in fact adopts Respondent's formulation, which not surprisingly fails to carry the day.

3. Claimant argued that "seat" corresponds to "registered office" in Cypriot law, defined as an office that has been registered. CEAC counsel stated, "Under our scenario, all you need to be satisfied of is that we have … incorporation [Sections 3 and 15 of the Companies Law] and a certificate of registered office [Section 102 of the Companies Law]." Again he said, "[A]ll you need is compliance with [Sections 3, 15 and 102], which is beyond doubt."[1]

4. Section 3 of the Cypriot Companies Law says persons associated for any lawful purpose may form a limited liability company by subscribing to a memorandum of association and "complying with the requirements of this Law in respect of registration." Section 15 provides for company creation to be certified by the Registrar on registration of the memorandum and articles of association. Section 102 requires a registered office in Cyprus "to which all communications and notices may be addressed."[2]

5. CEAC was incorporated and its memorandum and articles of association were filed with the Registrar, who was informed of the office at 4 Dimosthenous Street in Nicosia,[3] to which notices were delivered on multiple occasions, including sixteen communications from Respondent.[4]

6. Respondent's expert, Mr. Kypros Ioannides, proposed a more elaborate test of registered office, hemmed by a half dozen conditions, including physical premises, right to use property, public accessibility, amenability to service, presence of company registers, and a name plate.

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[1] Mr. Sprange, Transcript Day 2, pages 93 and 97.

[2] At commencement of this arbitration, a registered office could be filed within fourteen days from incorporation. During the proceedings, the law changed to require simultaneous filing, a practice also followed before amendment. Expert Opinion of Alecos Markides, 12 June 2015, paragraph 39.3.

[3] Certificates of Registered Office were dated 29 August 2005 (C 20), 29 October 2010 (C 95) and 16 November 2011 (C 56).

[4] Witness statement of Mr. Nicos Chrysanthou, 19 December 2014, paragraphs 17-20, testifying that CEAC regularly receives correspondence at its registered office, including at least sixteen letters from Montenegro and its counsel between January 2009 and April 2013, three of which were delivered through DHL. Although these deliveries do not themselves prove a registered office in March 2014 when the Arbitration Request was filed, no evidence suggests that the office was abandoned following the deliveries, a question of fact to be determined by the record in this case.

7. By contrast, Claimant's expert, Mr. Alecos Markides, endorsed none of these criteria as prerequisites to the existence of a registered office, but carefully distinguished conditions to the existence of a registered office (incorporation and registration) from the various purposes an office serves.[5]

8. Mr. Markides served for eight years as Attorney General of Cyprus. In that capacity he led the Cypriot Law Office in harmonizing national law with European Union regulations, an experience providing a unique qualification to understand the relationship of Cypriot corporate law with Continental analogues. No reason exists to discredit the expert testimony of Mr. Markides.

9. Based on the test proposed by Respondent (not Mr. Markides) the Award denies the existence of a registered office for CEAC, stressing that the office was not always open. Although doubtless the case, no evidence supports the position that constant accessibility constitutes a precondition to a registered office, or that inability to remain open triggers disregard of the office by the Register.[6]

10. Defective compliance with corporate obligations (such as name plate, ledgers and accessibility) may result in fines, but does not make the office disappear. Failure to comply with Respondent's six-part test does not rob CEAC of a registered office on Dimosthenous Street.

11. The Award notes that domestic authorities cannot determine jurisdiction for purposes of international treaties. While true, the observation does not lead to any determination of whether the registered office on Dimosthenous Street meets Treaty requirements, a matter to which we now turn.

II. Notions of Seat

12. To qualify as an investor under Article I(3) of the Treaty, a company incorporated in one contracting state must have its "seat" in the territory of that state. Seeking content to this requirement, arbitrators begin with Article 31 of the Vienna Convention on the Law of Treaties, calling for an "ordinary meaning" to be given to terms in context and in the light of treaty object and purpose. The relevant sources of international law, listed in Article 38 of the Statute of the International Court of Justice, include conventions, international custom and general principles of law, as well as judicial decisions and teachings of highly qualified publicists. None of these sources provides an "ordinary meaning" for seat in the context of this investment treaty and its objects.[7]

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[5] Expert Opinion of Alecos Markides, 12 June 2015, paragraph 44. This testimony separates the conditions for existence of a registered office (Section V.B) from its purposes (Section V.C). The keeping of ledgers, receipt of communications, and creation of judicial jurisdiction, were all included in Part V.C (purposes), not in Part V.B (conditions).

[6] Apparently FedEx could not make a delivery on 30 January 2014 and DHL could not make its delivery on 6 February 2014. Exhibits R-1 and R-2 respectively.

[7] Significantly, the ILC Draft Articles on Diplomatic Protection state that "international law has no rules of its own for the creation, management and dissolution of a corporation or for the rights of shareholders and their relationship with the corporation, and must consequently turn to municipal law for guidance on this subject." ILC, 58th Sess. (A/61/10), 2006 Yearbook International Law Commission (Vol. II, Part 2). Although useful in some situations, UNCTAD pronouncements carry no authority as a source of international law. In this context, both sides have referenced the UNCTAD Series on Issues in International Investment Agreements, UNCTAD/ITE/IIT/11 (Volume 2, 2001), RL-96, which does not purport to confirm any rule of international law, but simply mentions (page 83) that "generally speaking" a seat connotes place of effective management, adding that some investment agreements require "real economic activities" or "business activities".

13. The notion of corporate seat derives from the civil legal tradition, as a connecting point with a national legal order. Continental jurisdictions invokes terminology such as siège (France), Sitz (Germany), sede (Italy), domicilio (Spain) and sede (Portugal).

14. Although notions of "seat" are alien to the English tradition from which Cyprus derives its Companies Law, analogues can be found in the Bruxelles Regulation, providing that for Cyprus a statutory seat means, alternatively, registered office, place of incorporation or the place under the law of which the company formation took place. [8] CEAC appears to have a seat in Cyprus under any of these tests.

15. The Bruxelles Regulation also provides that "rules of private international law" determine seat for purposes of judicial jurisdiction over company creation.[9] In the English tradition of Cyprus, those rules look to either (i) place of incorporation and registered office or some other official address, or (ii) central management and control.[10] CEAC meets the first test, and thus has its seat in Cyprus.

16. Sometimes "seat" marries with a qualifier to become *siège réel* or "real seat". This Treaty did not adopt such language. An arbitral tribunal would be bold indeed to add adjectives on its own initiative. The Treaty drafters introduced no such additional requirements.

17. A different exercise for linking companies and legal orders might commend itself for claimants from Continental jurisdictions where notions of seat form an integral part of national corporate law.[11]

III. A Test That Fits the Context

18. The jurisdictional question in this case does not yield to facile analysis. International law as it currently stands provides no uniformly accepted "ordinary meaning" of corporate seat. The term "seat" remains essentially a municipal law concept derived from Continental systems, whereas Claimant's incorporation occurred in a common law country lacking such notions as such.

19. Apart from tax residency, the Parties advanced three tests of "seat" for consideration. One looks to a relatively deep level of economic penetration implicating management and control in Cyprus. The second imposes multiple criteria in determining registered office, and presupposes that an office ceases to be registered in the event of defective compliance with corporate formalities. The final test rests on a registered office in the plain meaning of that terms: an office that is registered.

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[8] Article 63(2), Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Bruxelles Regulation), 12 Dec. 2012, EU Regulation No. 1215/2012.

[9] Article 24, Bruxelles Regulation, granting exclusive jurisdiction to courts where a company has its seat.

[10] DICEY, MORRIS & COLLINS, CONFLICTS OF LAW (15th ed. 2012), paragraph 11-079. Noting that "seat" has no precise equivalent in Britain, the treatise continues (citing § 42 of the1982 Civil Jurisdiction and Judgments Act) that for the Bruxelles Convention (predecessor to the Bruxelles Regulation) a company has a seat in the UK if *either* (i) incorporated under UK law with registered office or some other official UK address or (ii) possessing central management and control exercised in the UK.

[11] A different exercise for linking companies to legal orders might commend itself for claimants from civil law jurisdictions where notions of seat form an integral part of national law. See Tenaris et al v. Venezuela, ICSID Case No. ARB/11/26 (29 January 2016), with investors from Luxembourg and Portugal, where (as noted in para. 148 of that decision) company formation requires a "siège" or a "sede" respectively. Tests might also differ when touching goals other than investment, such a tax, judicial jurisdiction, trading with enemies, litigation venue, and standing before the International Court of Justice.

20. The first test, mandating management and control in Cyprus, imports into the Treaty an obligation of substantial economic activity similar to "denial of benefits" provisions of free trade agreements and treaty shopping rules in tax treaties. However desirable such standards might be from a policy perspective, an arbitral tribunal bears a duty of fidelity to the treaty text as drafted, and cannot rewrite the contracting states' bargain. If the negotiators of this Treaty had wished to require investors to prove "management and control" they could have done so by adding those three words.

21. The second test finds no support in either domestic or international law. The test defines registered office according to six criteria, and posits that non-observance of these factors leads to disregard of the office. Adoption of that standard would require arbitrators to assume a policy-making mission in excess of their authority.

22. The third test, looking to the plain meaning of registered office, best matches the meaning of "seat" in Cyprus as used in this particular Treaty. Although international law does not currently permit a uniform definition of seat for treaty purposes, the last test commends itself in the configuration of this dispute. Under that standard, Claimant appears to possess a seat, precluding dismissal of the arbitration on this ground alone.

William W. Park

4 July 2016