B3 Croatian Courier Coöperatief U.A. v. Republic of Croatia (ICSID Case No. ARB/15/5)

Excerpts of Award dated April 5, 2019 made pursuant to Rule 48(4) of the ICSID Arbitration Rules of 2006

Claimant

B3 Croatian Courier Coöperatief U.A. (Dutch national)

Respondent

Republic of Croatia ("Croatia")

Tribunal

Bernard Hanotiau (President; Belgian), appointed by the co-arbitrators in consultation with the Parties under Article 37(2)(a) of the ICSID Convention

Stanimir Alexandrov (Bulgarian), appointed by the Claimant

Brigitte Stern (French), appointed by the Respondent

Award

Award of April 5, 2019 in English (unpublished)

Instrument relied on for consent to ICSID arbitration

Agreement on Encouragement and Reciprocal Protection of Investments between the Republic of Croatia and the Kingdom of the Netherlands, which entered into force on 1 June 1999 (the "BIT")

Procedure

Applicable Arbitration Rules:	ICSID Arbitration Rules in force as of April 2006
Place of Proceedings:	Washington, D.C.
Procedural Language:	English
Full procedural details:	Available at https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/15/5

Factual Background

The Claimant operated a company in Croatia which provided postal services. The case concerned allegations that the Croatian Government, through the actions of the Ministry of Transport, the Competition Authority and the postal services regulator, violated the applicable regulatory framework and attempted to re-monopolize the postal services market. According to the Claimant, by failing to properly apply the regulatory framework and by discriminating against the Claimant, Croatia failed to accord the Claimant fair and equitable treatment. Also, the Claimant complained that Croatia's treatment led to the complete destruction of the value of its investment, and therefore the measures amounted to an indirect expropriation.

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EXCERPTS

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

B3 Croatian Courier Coöperatief U.A.

v.

Republic of Croatia

(ICSID Case No. ARB/15/5)

AWARD

Members of the Tribunal
Professor Bernard Hanotiau, President of the Tribunal
Dr. Stanimir Alexandrov, Arbitrator
Professor Brigitte Stern, Arbitrator

Secretary of the Tribunal
Mr. Francisco Abriani

Assistant to the Tribunal
Ms. Iuliana Iancu

Date of dispatch to the Parties: 5 April 2019

Parties' representatives

Representing B3 Croatian Courier Coöperatief U.A.

Ms. Monika Lukacs (party representative)
The Bancroft Group

Mr. John Willems
Ms. Noor Davies
Mr. Sven Volkmer
Mr. Bachir Sayegh
Ms. Tara Agoston

White & Case LLP
19, Place Vendôme
75001 Paris
France

Representing the Republic of Croatia

Ms. Zlata Hrvoj-Šipek
Ms. Željka Šaškor
Ms. Melina Rališ
Ms. Kosjenka Krapac

State Attorney's Office
Gajeva 30a,
10000 Zagreb
Republic of Croatia

and

Mr. Tim Portwood
Mr. Louis-Christophe Delanoy
Ms. Marina Weiss
Ms. Giulia Carbone
Mr. Shane Daly
Ms. Julia Benke

Bredin Prat
53 Quai d'Orsay
75007 Paris
France

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I. THE PARTIES

1. The present dispute has been submitted to arbitration under the auspices of the International Centre for Settlement of Investment Disputes ("ICSID" or "the Centre") on the basis of Article 9 of the Agreement on Encouragement and Reciprocal Protection of Investments between the Republic of Croatia and the Kingdom of the Netherlands, which entered into force on 1 June 1999 (the "BIT" or the "Treaty").[1]

2. Claimant is B3 Croatian Courier Coöperatief U.A. ("B3 Courier" or "Claimant"), a cooperative incorporated under the laws of the Netherlands, with its registered address at […].

3. Claimant is represented in this arbitration by its duly authorized attorneys and counsel mentioned at page 2 above.

4. Respondent is the Republic of Croatia ("Croatia" or "Respondent").

5. Respondent is represented in this arbitration by its duly authorized attorneys and counsel mentioned at page 2 above.

6. Claimant and Respondent are jointly referred to as the "Parties" and individually as a "Party".

II. PROCEDURAL HISTORY

7. On 14 January 2015, the Centre received a Request for Arbitration (the "Request for Arbitration") from B3 Courier. On 21 January 2015, the Centre, in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the "Institution Rules"), acknowledged receipt of the Request for Arbitration and transmitted a copy to Croatia.

8. On 3 February 2015, the Secretary-General of ICSID registered the Request for Arbitration and notified the Parties, pursuant to Article 36 of the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the "ICSID Convention" or the "Convention") and in accordance with Institution Rules 6 and 7. The case was registered as ICSID Case No. ARB/15/5.

[1] Agreement on Encouragement and Reciprocal Protection of Investments between the Republic of Croatia and the Kingdom of the Netherlands signed on 28 April 1998 and entered into force on 1 June 1999 (Exhibit CL-97).

9. On 5 May 2015, Claimant appointed Dr. Stanimir Alexandrov, a national of Bulgaria, as arbitrator in this case. Dr. Alexandrov accepted this appointment on 26 May 2015.

10. On 20 May 2015, the Parties agreed on the number of arbitrators and the method of their appointment. The Parties agreed that the Tribunal would be made up of three arbitrators, with one arbitrator appointed by Claimant, one arbitrator appointed by Respondent and the President of the Tribunal to be appointed by the party-appointed arbitrators in consultation with the Parties.

11. On 4 June 2015, Respondent appointed Prof. Brigitte Stern, a French national, as arbitrator. Prof. Stern accepted her appointment on 9 June 2015.

12. On 28 July 2015, following appointment by the two co-arbitrators, Prof. Bernard Hanotiau, a Belgian national, accepted his appointment as Presiding arbitrator.

13. On the same day, ICSID's Secretary-General notified the Parties that the Tribunal was deemed to be constituted in accordance with Article 37(2)(b) of the Convention and Rule 6 of the ICSID Arbitration Rules (the "Arbitration Rules"). The Centre also informed the Parties and the Tribunal that Mr. Francisco Abriani, ICSID, would serve as Secretary of the Tribunal.

14. On 22 September 2015, pursuant to Arbitration Rule 13(1), the Tribunal held the first session by video-conference.

15. On 5 October 2015, after consultation with the Parties, Procedural Order No. 1 was issued by the Tribunal, recording the Parties' agreement and the Tribunal's decisions on a number of procedural matters. Among other things, it was decided that the applicable Arbitration Rules would be the Rules in force as of April 2006 and that the place of proceedings would be Paris, France. The Tribunal confirmed the Parties' agreement that Ms. Iuliana Iancu act as Assistant to the Tribunal.

16. On 30 November 2015, pursuant to Procedural Order No. 1, Claimant submitted its Memorial (the "Memorial"), accompanied by:
    - the witness testimonies of […];
    - the expert testimonies of […];
    - factual exhibits C-1 through C-279; and
    - legal authorities CL-1 through CL-109.

17. On 9 March 2016, Respondent filed a Notification of Jurisdictional Objections and Request for Bifurcation (the "Request for Bifurcation"), accompanied by legal authorities (RL-1 through RL-17) and a suggested procedural calendar, as well as a letter requesting that Claimant inform the Tribunal and Respondent as to the current status of the funding of its claims in these proceedings.

18. On 11 March 2016, the Tribunal invited Claimant to submit its comments on Respondent's request for disclosure of third-party funding by 18 March 2016. The Tribunal also invited the Parties to confer and agree on a calendar for the filing of submissions concerning Respondent's Request for Bifurcation by the same deadline.

19. On 18 March 2016, Claimant informed Respondent and the Tribunal that it had not entered into any form of third-party funding arrangements to finance its claims in these proceedings and that it had not entered into any form of assignment or transfer arrangements in view of assigning or transferring any of its claims to a third party.

20. On the same date, the Parties notified the Tribunal of the procedural calendar for the purposes of Respondent's Request for Bifurcation.

21. On 29 March 2016, Claimant filed its Response to Respondent's Request for Bifurcation, accompanied by factual exhibits (C-301, C-302, C-303, and C-304) and legal authorities (CL-114 through CL-122).

22. On 6 April 2016, Respondent submitted Observations on Claimant's Response to Respondent's Request for Bifurcation.

23. On 13 April 2016, Claimant filed its Response to Croatia's Observations of 6 April 2016, accompanied by factual exhibits (C-305 through C-316) and legal authorities (CL-125 to CL-127).

24. On 22 April 2016, the Tribunal issued the Decision on Bifurcation. On the same day, the Parties agreed to extend the deadline for the submission of Respondent's Counter-Memorial (the "Counter-Memorial") to 2 May 2016, which the Tribunal accepted.

25. On 29 April 2016, the Parties agreed to amend the procedural timetable, which the Tribunal accepted on 4 May 2016.

26. On 2 May 2016, Respondent submitted its Counter-Memorial, accompanied by:
    - the witness testimonies of […];
    - the expert testimonies of […];

- factual exhibits R-1 through R-150; and
- legal authorities RL-18 through RL-76.

27. On 17 May 2016, the Parties exchanged their respective document production requests. The comments and objections to those requests were exchanged on 23 May 2016.

28. On 30 May 2016, following the receipt of a request from Claimant dated 29 May 2016 and of a reply from Respondent dated 30 May 2016, the Tribunal accepted to extend the deadline for its decision concerning the Parties' document production requests until 17 June 2016.

29. On 2 June 2016, the Parties exchanged their further observations concerning the document production requests and submitted them to the Tribunal. During the following two weeks, the Parties also exchanged additional observations regarding confidentiality and the issue of possession, custody or control of the requested documents.

30. On 17 June 2016, the Tribunal issued Procedural Order No. 2, dealing with the Parties' document production requests and directing Respondent to submit comments with regard to Claimant's proposed confidentiality order within seven days of receipt of Procedural Order No. 2.

31. On 25 June 2016, Respondent submitted its comments with regard to Claimant's proposed confidentiality order.

32. On 30 June 2016, Claimant represented that it had no objections to the amendments proposed by Respondent with regard to the confidentiality order.

33. On the same day, the Tribunal issued Procedural Order No. 3, establishing a confidentiality regime applicable in this arbitration.

34. On 2 August 2016, Claimant requested that the Tribunal order Respondent to immediately comply with its disclosure obligations with respect to Claimant's Request No. 22 under Procedural Order No. 2 or, failing immediate compliance, draw adverse inferences against Respondent on account of non-disclosure in violation of Procedural Order No. 2.

35. On 3 August 2016, the Tribunal invited Respondent to submit its reply with regard to Claimant's application by 8 August 2016.

36. On 4 August 2016, Claimant requested that the Tribunal grant it an extension for the submission of the reply.

37. On 8 August 2016, upon leave from the Tribunal, Respondent represented that it did not object to Claimant's request for an extension. However, Respondent reserved the right to request an extension for the preparation of its rejoinder equal to the same amount of time given to Claimant.

38. On 9 August 2016, Respondent submitted its answer to Claimant's application of 2 August 2016. Claimants replied to Respondent's letter that same day.

39. On the same date, the Tribunal amended the procedural calendar.

40. On 11 August 2016, Respondent indicated its commitment to produce the documents responsive to Claimants' Request No. 22 under Procedural Order No. 2.

41. On 12 August 2016, Claimant withdrew its application of 2 August 2016 following Respondent's representation above.

42. On 13 September 2016, Claimant requested an additional two-day extension for the filing of its Reply, to which Respondent did not object with the proviso that it reserved the right to request a similar extension for its Rejoinder.

43. On 14 September 2016, the Tribunal granted the extension.

44. On 16 September 2016, Claimant submitted its Reply (the "Reply"), accompanied by:
    - the witness testimonies of […];
    - the expert testimonies of […];
    - factual exhibits C-317 through C-489; and
    - legal authorities CL-128 through CL-186.

45. On 14 November 2016, the ICSID Secretariat circulated to the Parties a disclosure made by Arbitrator Stern.

46. On 17 November 2016, Claimant took note of Arbitrator Stern's disclosure.

47. On the same day, the ICSID Secretariat circulated to the Parties a disclosure made by Arbitrator Alexandrov.

48. On 23 November 2016, Respondent requested that Claimant produce either voluntarily or following an order from the Tribunal documents showing. The application was accompanied by factual exhibits R-151 through R-153 and legal authority RL-77.

49. On 2 December 2016, upon invitation from the Tribunal, Claimant filed its response. Claimant argued that Respondent's document production requests were belated and addressed undisputed and irrelevant issues. Claimant however undertook to search for and produce responsive documents.

50. On 16 December 2017, the ICSID Secretariat wrote to the Parties concerning the organization of the hearing on jurisdiction and the merits.

51. On 26 January 2017, the ICSID Secretariat reverted to the Parties concerning the organization of the hearing on the merits, noting that one of the arbitrators had a conflicting commitment on Monday, 20 March 2017, and therefore the Tribunal would not be able to sit on that date.

52. On the same day, Respondent requested an extension for the submission of its Rejoinder to 30 January 2017, which Claimant had no objection to. The Tribunal granted the extension on the same day.

53. On 30 January 2017, Respondent submitted its Rejoinder, accompanied by:
- the witness testimonies of […];
- the expert testimonies of […];
- the legal opinions of […];
- factual exhibits R-154 through R-207; and
- legal authorities RL-78 through RL-124.

54. On 13 February 2017, the Parties notified each other and the Tribunal of the list of witnesses and experts that they intended to cross-examine at the hearing.

55. On 16 February 2017, Claimant inquired whether the Tribunal would be available to sit on Saturday, 18 March 2017, or, alternatively, on Saturday, 25 March 2017.

56. On 19 February 2017, the Tribunal suggested lengthening the hearing days on the first week of the hearing (13-17 March) and on the following Tuesday (21 March) by an additional hour, from 9 am to 6 pm.

57. On 20 February 2017, the Parties communicated their positions with respect to the organization of the hearing on jurisdiction and the merits.

58. On 22 February 2017, the Tribunal issued Procedural Order No. 4 concerning the organization of the hearing jurisdiction and on the merits.

59. The hearing on jurisdiction and the merits took place during the period of 13-17, 21-24 March 2017, at the World Bank Paris Office, 66, avenue d'Iéna, 75116 Paris. In addition to the Tribunal members, the Secretary of the Tribunal and the Assistant to the Tribunal, the following persons participated at the hearing:

On behalf of Claimant:

Ms. Monika Lukacs, The Bancroft Group
Mr. John Willems, White & Case LLP
Ms. Noor Davies, White & Case LLP
Mr. Sven Volkmer, White & Case LLP
Mr. Bachir Sayegh, White & Case LLP
Ms. Hadia Hakim, White & Case LLP
Ms. Tara Agoston, White & Case LLP
Mr. Reese Oñate, White & Case LLP

On behalf of Respondent:

Ms. Željka Šaškor, Republic of Croatia, State Attorney's Office
Ms. Melina Rališ, Republic of Croatia, State Attorney's Office
Ms. Kosjenka Krapac, Republic of Croatia, State Attorney's Office
Ms. Maja Kuhta, Republic of Croatia, State Attorney's Office
Mr. Tim Portwood, Bredin Prat
Dr. Raëd Fathallah, Bredin Prat
Mr. Shane Daly, Bredin Prat
Ms. Giulia Carbone, Bredin Prat
Ms. Julia Benke, Bredin Prat
Mr. Alexandre Souleye, Bredin Prat
Mr. Olivier Billard, Bredin Prat
Mr. Toni Nogolica, Bredin Prat
Ms. Elisabeth Malafa, Bredin Prat

Witnesses:

[…]

Experts:
[…]

Interpreters:
Ms. Eliza Burnham, French to English
Ms. Chantal Bret, French to English
Ms. Christina Victorin, French to English
Ms. Julijana Jularic-Beekman, Croatian to English
Mr. Toni Luburić, Croatian to English
Ms. Vlatka Mihelić-Landay, Croatian to English

Court reporters:
Ms. Georgina Ford, Briault Reporting Services
Ms. Ashleigh Roberts, Briault Reporting Services

60. On 15 March 2017, Claimant submitted its corrections to the expert reports of […].

61. On 20 March 2017, Claimant submitted an amended version of Exhibit C-490.

62. On 5 April 2017, the ICSID Secretariat circulated to the Parties a disclosure made by President Hanotiau.

63. On 11 April 2017, the Tribunal circulated a list of questions for the Parties' post-hearing submissions.

64. On 19 May 2017, amended transcripts of the hearing were circulated by the court reporters.

65. On 30 June 2017, the Parties filed the first round of their respective post-hearing submissions ("C-PHB1" and "R-PHB1", respectively). Respondent's submission was accompanied by Exhibit R-207, a translation of part of […]'s General conditions for the provision of other postal services and additional services (an initial section thereof was on the record as exhibit C-356).

66. On 28 July 2017, the Parties submitted their reply post-hearing submissions ("C-PHB2" and "R-PHB2", respectively).

67. On 28 August 2017, in answer to an inquiry from the Parties, the Tribunal directed the Parties to file their cost submissions in the form of brief (no more than 10 pages) memorials on the issues pertaining to the question of costs.

68. On 15 September 2017, the Parties filed their submissions on costs ("C-CS" and "R-CS", respectively).

69. On 17 April 2018, Respondent filed a request for leave to submit a new jurisdictional objection, based on the Judgment of the European Court of Justice (the "CJEU") in Case C-284/16 *Slowakische Republik v. Achmea BV* ("Achmea"). In its application ("R-Ach1"), Respondent set out a number of arguments supporting its new jurisdictional objection.

70. On 18 April 2018, the Tribunal invited Claimant to comment on Respondent's request for leave by 24 April 2018. Claimant was instructed not to address, at that point, the merits of Respondent's jurisdictional arguments.

71. On 24 April 2018, the ICSID Secretariat circulated to the Parties a disclosure made by Arbitrator Stern.

72. On the same day, Claimant submitted its comments on Respondent's request for leave to file a new jurisdictional objection. Claimant accompanied its submission by Exhibit C-0490,[2] as well as Exhibits CL-187, CL-188 and CL-122 (amended).

73. On 25 April 2018, the Tribunal granted Respondent leave to answer Claimant's submission of the previous day, which Respondent did on 27 April 2018. Respondent attached Exhibits RL-125 through RL-131.

74. On 2 May 2018, following leave from the Tribunal, Claimant submitted additional comments regarding Respondent's request for leave.

75. On 3 May 2018, the Tribunal issued Procedural Order No. 5, granting Respondent leave to introduce an additional jurisdictional objection into the record and setting a calendar for the pleadings.

76. On 14 May 2018, Respondent submitted its second memorial contesting jurisdiction on the basis of the *Achmea* judgment ("R-Ach2"), accompanied by Exhibits R-208 and R-209, and by legal authorities RL-125 through RL-149.

77. On 1 June 2018, Claimant submitted its memorial addressing Respondent's jurisdictional objection based on the *Achmea* judgment ("C-Ach"), accompanied by authorities CL-189 through CL-200.

[2] The Tribunal considers that this exhibit was incorrectly numbered.

78. On 2 August 2018, the ICSID Secretariat circulated to the Parties a disclosure made by President Hanotiau and Arbitrator Stern.

79. On 6 March 2019, pursuant to Arbitration Rule 37(2), the European Commission filed an application for leave to intervene as a non-disputing party.

80. On 15 March 2019, after consulting both Parties, the Tribunal issued Procedural Order No. 6, dismissing the European Commission's application.

81. On 19 March 2019, the Tribunal closed the proceedings.

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V. THE APPLICABLE LEGAL FRAMEWORK

425. Article 1 paragraphs (a) and (b) of the BIT read:

> "For the purposes of this Agreement:
> (a) the term 'investments' means every kind of asset and more particularly, though not exclusively:

(i) movable and immovable property as well as other rights in rem in respect of every kind of asset;

(ii) rights derived from shares, bonds and other kinds of interests in companies and joint ventures;

(iii) claims to money, to other assets or to any performance having an economic value;

(iv) rights in the field of intellectual property, technical processes, goodwill and know-how;

(v) rights granted under public law or under contract, including rights to prospect, explore, extract and win natural resources.

(b) the term "nationals" shall comprise with regard to either Contracting Party:

(i) natural persons having the nationality of that Contracting Party;

(ii) legal persons constituted under the law of that Contracting Party;

(iii) legal persons not constituted under the law of that Contracting Party but controlled, directly or indirectly, by natural persons as defined in (i) or by legal persons as defined in (ii)."

426. Article 3(1) of the BIT provides:

"Each Contracting Party shall ensure fair and equitable treatment of the investments of nationals of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those nationals. Each Contracting Party shall accord to such investments full physical security and protection."

427. Article 6 of the BIT reads:

"Neither Contracting Party shall take any measures depriving, directly or indirectly, nationals of the other Contracting Party of their investments unless the following conditions are complied with:

a) the measures are taken in the public interest and under due process of law;

b) the measures are not discriminatory or contrary to any undertaking which the Contracting Party which takes such measures may have given;

c) the measures are taken against just compensation. Such compensation shall represent the genuine value of the investments affected, shall include interest at a normal commercial rate until the date of payment and shall, in order to be effective for the claimants, be paid and made transferable, without delay, to the country designated by the claimants concerned

> and in the currency of the country of which the claimants are nationals or in any freely convertible currency accepted by the claimants."

428. Article 9 of the Treaty provides in relevant part:

> "1. Disputes between one Contracting Party and a national of the other Contracting Party concerning an obligation of the former under this agreement in relation to an investment of the latter, shall at the request of the national concerned be submitted to the International Centre for Settlement of Investment Disputes, for settlement by arbitration or conciliation under the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on 18 March 1965.
> […]
> 3. Each Contracting Party hereby gives its unconditional consent to the submission of disputes as referred to in Paragraph 1 of this Article to international arbitration in accordance with the provisions of this Article."

429. Article 10 of the Treaty reads:

> "The present Agreement shall apply to investments, made in the territory of one of the Contracting Parties, in accordance with its legislation, by investors of the other Contracting Party prior to as well as after the entry into force of the present Agreement. The present Agreement shall however not be applicable to disputes concerning investments which are subject of a dispute settlement procedure under the Agreement on the Protection of Investments between the Socialist Federal Republic of Yugoslavia and the Kingdom of the Netherlands of 16 February 1976. In that case the latter Agreement shall continue to apply to these investments, as far as it concerns the disputes referred to, until a final settlement for these disputes has been reached."

VI. WHETHER THE TRIBUNAL HAS JURISDICTION

A. Respondent's position

1. Objection No. 1: The dispute resolution clause included in Article 9 of the Treaty is inapplicable

430. […]

Article 9 is inapplicable to the present dispute due to its incompatibility with EU law

432. […]

Article 9 is inapplicable to the present dispute by operation of Article 30 of the VCLT

439. […]

Article 9 is inapplicable to the present dispute by operation of Article 351 TFEU

446. […]

The effects of incompatibility

448. […]

2. Objection No. 2: The Tribunal lacks jurisdiction ratione voluntatis

451. […]

3. Objection No. 3: The Tribunal lacks jurisdiction ratione materiae

461. […]

4. Objection No. 4: The Tribunal lacks jurisdiction ratione temporis over claims pre-dating 1 April 2011

468. […]

B. Claimant's position

470. […]

1. Objection No. 1: The dispute resolution clause included in Article 9 of the Treaty remains applicable

476. […]

Article 30 of the VCLT has no bearing on the Tribunal's jurisdiction

480. […]

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2. Objection No. 2: The Tribunal has jurisdiction ratione voluntatis

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4. Objection No. 4: The Tribunal lacks jurisdiction ratione temporis over claims pre-dating 1 April 2011

506. […]

C. The Tribunal's analysis

1. Objection No. 1: Whether the dispute resolution clause included in Article 9 of the Treaty is inapplicable

507. The Tribunal notes that Respondent has put forward three alternative bases for its jurisdictional objection:

i. The investor-State dispute settlement provision contained in the Treaty (Article 9) is incompatible with EU law;
ii. Article 30 of the VCLT confirms that in the intra-EU context Article 9 has been superseded by the TFEU; and
iii. Pursuant to Article 351 of the TFEU, the TFEU prevails over Article 9 of the BIT.

508. The Tribunal notes that the alleged incompatibility between Article 9 of the Treaty and EU law is set out both as a distinct and sufficient basis for Respondent's jurisdictional objection, and as one of the (several) conditions that justifies the application of Article 30 of the VCLT and/or Article 351 of the TFEU.

509. The Tribunal has carefully considered the Parties' arguments put forward in favor of upholding or denying jurisdiction on account of the alleged incompatibility between Article 9 of the Treaty and EU law, and the succession in time between the BIT and the EU treaties. For the reasons that will be developed in more detail in the paragraphs below, the Tribunal has reached the conclusion that Respondent's jurisdictional objection must be dismissed.

i. The applicable law

510. Respondent argues that the Tribunal must apply EU law in deciding the question whether it has jurisdiction. More precisely, Respondent argues that: (i) Article 42 of the ICSID Convention requires that the Tribunal, in the absence of the Parties' agreement to the contrary, decide the dispute submitted to it in accordance with the national law of the State and "such rules of international law as may be applicable"; (ii) EU law forms part of international law, as well as part of the law of Croatia; and, therefore, (iii) EU law applies to the assessment of this Tribunal's jurisdiction.

511. The Tribunal considers that Respondent's arguments above fail to distinguish between the law applicable to jurisdiction and the law applicable to the merits. The Tribunal is of the view that Article 42 of the ICSID Convention, relied upon by Respondent, refers to the choice of law for the merits of the dispute, and not for jurisdiction. This conclusion has been repeatedly confirmed by other investment arbitration tribunals constituted on the basis of the ICSID Convention. This Tribunal considers that the reference in Article 42(1) of the ICSID Convention to "dispute" ("The tribunal shall decide a dispute") should be interpreted on the basis of Article 31 of the VCLT so as to refer to the substantive dispute between the parties. In contrast, it will be Article 25 of the ICSID Convention and the relevant provisions of the consent instrument – in this case, Article 9 of the Treaty – that will be pertinent for the Tribunal's jurisdiction. The Tribunal notes in this respect that Article 25's placement within the body of the ICSID Convention (*i.e.*, in Chapter II, Jurisdiction of the Centre) further underscores the fact that it is Article 25, as opposed to Article 42(1) of the ICSID Convention, that should be the starting point of the Tribunal's assessment of its own jurisdiction.

512. Consequently, the Tribunal's jurisdictional analysis must focus on the text of the Treaty (in particular, Article 9) and on Article 25 of the ICSID Convention.

513. The analysis above should not be understood *a contrario* as a statement that EU law is applicable to the merits of the dispute. The Tribunal agrees with Claimant that its mandate in these proceedings is to apply the provisions of the Treaty and customary international law to determine whether Respondent has breached its international obligations. The Tribunal's reasoning and ultimate decision as reflected in this Award are based on the provisions of the Treaty and applicable principles of customary international law. They are not based on EU law. EU law forms part of the factual matrix of this case, but is not a basis for determining liability (or lack thereof).

514. The observation above applies *à plus forte raison* in the case of the events which pre-date Croatia's accession to the European Union. Croatia was under an obligation to incorporate

the *acquis communautaire* as of the date of its accession to the bloc, but EU law did not form part of Croatian law until its accession, on 1 July 2013. In other words, prior to 1 July 2013, there could have been no question of the Tribunal being "called on to interpret or indeed apply EU law"[3] as there was no EU law that applied in Croatia. Consequently, the reasoning of the *Achmea* judgment that forms the basis for the CJEU's finding of incompatibility between intra-EU arbitration clauses and the TFEU is by definition not applicable to the events which pre-dated Croatia's accession to the EU.

515. At the outset, the Tribunal underscores that it is not persuaded by Respondent's argument that the *Achmea* judgment is binding upon it. As an international arbitral tribunal constituted on the basis the ICSID Convention, the Tribunal is not bound by the rulings of the CJEU. Nevertheless, in the paragraphs below, the Tribunal will demonstrate that, even if it were to consider the *Achmea* judgment to be binding (*quod non*), this would not deprive the Tribunal of jurisdiction under the Treaty or the ICSID Convention.

ii. The first prong of Respondent's objection: whether Article 9 of the Treaty is inapplicable to the present dispute due to its incompatibility with EU law

516. The crux of Respondent's argument seems to be that, due to the incompatibility between Article 9 of the Treaty and the TFEU, Croatia could not have expressed, and therefore did not express, a valid consent to arbitrate disputes with Dutch investors. Respondent argues that Croatia's consent to be bound by the Treaty and thus the validity of its consent under the ICSID Convention must be assessed by reference to the TFEU. Moreover, Respondent argues that such assessment must be both prospective and retroactive.

517. The Tribunal recalls that, pursuant to Article 42 of the VCLT to which both Croatia and the Netherlands are parties, the validity of Croatia's consent to be bound by the Treaty can be challenged solely on the basis of the grounds set out in the VCLT. Article 42 states as follows:

> "1. The validity of a treaty or of the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention.
>
> 2. The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty." [emphasis added]

518. The Tribunal finds that the Treaty's alleged incompatibility with EU law, as declared by the CJEU, does not fall within the sphere of application of any one of the grounds for

[3] Achmea judgment, at 42.

invalidating a treaty, which are set out in Articles 46 through 53 of the VCLT: provisions of internal law regarding competence to conclude treaties (Article 46); specific restrictions on authority to express consent of the State (Article 47); error (Article 48); fraud (Article 49); corruption of a representative of a State (Article 50); coercion of a representative of a State (Article 51); coercion of a State by the threat or use of force (Article 52); and conflict with a peremptory norm of general international law (Article 53).

519. Respondent has not invoked any of the grounds set out in Articles 46 through 53 of the VCLT to argue that the Treaty, or any part thereof, is invalid. Respondent's argument focuses exclusively on the Treaty's (and its Article 9) incompatibility with EU law.

520. The Tribunal considers it to be uncontroversial that EU law does not qualify as a peremptory norm of general international law (or *jus cogens*) such that a conflict with its norms and principles would invalidate Croatia's consent to be bound by the Treaty (Article 53 of the VCLT).

521. Presumably, Respondent's argument might fall within the scope of Article 46 of the VCLT, *i.e.*, the consent to be bound by the Treaty was given in violation of provisions of internal law (based on the reasoning that EU law, as interpreted by the CJEU in the *Achmea* judgment, is part of the internal law of all EU Member States, including Respondent). The Tribunal does not see even a remote link between Respondent's argument and any one of the other grounds for invalidating consent to be bound by a Treaty listed in the VCLT.

522. However, even if one were to approach EU law from this (limited) perspective, the VCLT is not of great assistance to Respondent's case. Article 46 of the VCLT specifies that the provisions of a State's internal law may not be invoked in order to invalidate its consent to be bound by a treaty, unless the violation of internal law was manifest and concerned a rule of fundamental importance. Further, Article 46 of the VCLT defines "manifest" as "objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith":

> "1. A State may <u>not</u> invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent <u>unless that violation was manifest and concerned a rule of its internal law of fundamental importance</u>.
>
> 2. A violation is <u>manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith</u>." [emphasis added]

523. The Tribunal is of the view that any incompatibility between Article 9 of the Treaty and Articles 267 and 344 of the TFEU cannot be considered as "manifest" as this term is defined in Article 46(2) of the VCLT.

524. First, the Tribunal recalls that, in the *Achmea* judgment, the CJEU framed the incompatibility between intra-EU investment arbitration clauses and the TFEU in terms of the mere potential to threaten the full effectiveness of EU law, not in terms of a blatant violation of EU law:

> "56. Consequently, having regard to all the characteristics of the arbitral tribunal mentioned in Article 8 of the BIT and set out in paragraphs 39 to 55 above, it must be considered that, by concluding the BIT, the Member States parties to it established a mechanism for settling disputes between an investor and a Member State which could prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law, even though they might concern the interpretation or application of that law."[4] [emphasis added]

525. Second, the Tribunal recalls that the question of the compatibility of intra-EU bilateral investment treaties with EU law has been the subject of considerable debate. The position of the European Commission itself has evolved. At the initial stages of the European Union's enlargement in Central and Eastern Europe, the purported incompatibility between intra-EU arbitration clauses and EU law was not raised as an issue. Subsequently, the European Commission took the view that Member States should begin proceedings to terminate intra-EU BITs according to their own terms. At that time, the European Commission was careful to note that these agreements did not terminate or cease to apply automatically. Subsequently, the European Commission began arguing that intra-EU BITs had already ceased to apply on account of being incompatible with EU law. Before the CJEU rendered its judgment, the Advocate General Wathelet expressed the opinion that no incompatibility existed between intra-EU BITs and EU law.

526. The Tribunal considers that the evolution in the European Commission's position and the contrary opinion of Advocate General Wathelet are a perfect illustration that, up until the *Achmea* judgment was issued, the arbitration clauses' compatibility with EU law was very much an open, complex and disputed question on the plane of EU law, and that it could not have been "objectively evident to any State conducting itself in the matter in accordance with normal practice and good faith" that the CJEU would eventually find an incompatibility to exist.

[4] Achmea judgment, at 56, 59.

527. Therefore, even if Respondent had invoked Article 46 of the VCLT, which it has not, that provision would not provide sufficient grounds for the Tribunal to conclude that the Treaty, or its arbitration clause, was invalidated.

528. Consequently, the validity of Croatia's consent to be bound by the Treaty cannot be impeached by Respondent on the basis of any one of the grounds listed in Articles 46 through 53 of the VCLT.

529. This conclusion is not affected by the fact that Respondent does not purport to contest Croatia's consent to be bound by the entire Treaty, but only by its Article 9. Article 44 of the VCLT, on the separability of treaty provisions, provides in relevant part:

> "2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present Convention may be invoked only with respect to the whole treaty except as provided in the following paragraphs or in article 60.
>
> 3. If the ground relates solely to particular clauses, it may be invoked only with respect to those clauses where:
> (a) the said clauses are separable from the remainder of the treaty with regard to their application;
> (b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and
> (c) continued performance of the remainder of the treaty would not be unjust." [emphasis added]

530. In other words, the VCLT establishes that the parties to a treaty cannot, as a rule, invalidate or suspend individual provisions in a treaty, but only the entire document. If contracting parties wish to invalidate or suspend individual provisions, they must demonstrate: (i) that there is "[a] ground for invalidating … or suspending the operation of a treaty recognized in the present Convention" that affects such individual provisions; (ii) that the challenged clause is separable from the remainder of the treaty; (iii) that the challenged clause "was not an essential basis of the consent of the other party … to be bound by the treaty as a whole"; and (iv) that "continued performance of the remainder of the treaty would not be unjust".

531. Respondent has not made any such demonstration. Instead, Respondent has confined its pleadings to arguing – without providing any justifying rationale – that Croatia's consent to arbitrate this dispute is invalid on account of its incompatibility with EU law. Assuming, as stated by the CJEU, that Croatia's consent to arbitrate disputes with Dutch investors under Article 9 of the Treaty is incompatible with the TFEU, it would mean that Croatia is in breach of its obligations under EU law. This, however, is not a ground for invalidating

Respondent's consent to be bound by the Treaty (or by its arbitration clause) pursuant to the VCLT. Respondent's potential breach of its obligations under EU law does not affect Croatia's consent to be bound by Article 9 of the Treaty and/or the ICSID Convention, which is assessed by reference to these legal instruments and the VCLT.

532. In conclusion, Respondent has not demonstrated that any grounds for invalidating its consent to be bound by the Treaty or its arbitration clause, as limitatively set out in the VCLT, exist in the present case. This is sufficient to conclude that Croatia's consent to be bound by the Treaty and its Article 9 was validly expressed.

533. However, out of an abundance of caution, the Tribunal shall also show that, even if Respondent had successfully invoked a ground for challenging the validity of its consent to be bound by the Treaty or its Article 9 (*quod non*), this would not be sufficient to deprive the Tribunal of jurisdiction for the following two reasons. The first is that the invalidation of the Treaty would not have operated automatically, but only at the conclusion of a procedure clearly set out in Articles 65-67 of the VCLT. The second is that, even if such a procedure had been followed (*quod non*), it would not have affected arbitration agreements concluded in good faith, such as the one which is the basis for this Tribunal's jurisdiction. The Tribunal shall explain these findings in more detail in the paragraphs below.

534. The Tribunal recalls that, pursuant to Articles 65-67 of the VCLT, the invalidation, termination, withdrawal from or suspension of the operation of a treaty do not operate automatically, but must follow a specific procedure[5]:

> "*Article 65*
> *Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty*
>
> 1. A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.
>
> 2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the

[5] The only instance in which the invalidation and termination of a treaty operate automatically is if the treaty is contrary to a norm of *jus cogens*, pursuant to Article 64 of the VCLT: "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates." The Tribunal has already established that EU law does not qualifiy as a peremptory norm of general international law, such that a conflict with its norms and principles would invalidate Croatia's consent to be bound by the Treaty. Article 64 of the VCLT is therefore inapplicable.

> party making the notification may carry out in the manner provided in article 67 the measure which it has proposed.
>
> 3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.
>
> 4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.
>
> 5. Without prejudice to article 45, the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.
>
> *Article 66*
> *Procedures for judicial settlement, arbitration and conciliation*
>
> If, under paragraph 3 of article 65, no solution has been reached within a period of 12 months following the date on which the objection was raised, the following procedures shall be followed:
>
> (*a*) any one of the parties to a dispute concerning the application or the interpretation of article 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration;
>
> (*b*) any one of the parties to a dispute concerning the application or the interpretation of any of the other articles in part V of the present Convention may set in motion the procedure specified in the Annex to the Convention by submitting a request to that effect to the Secretary-General of the United Nations.
>
> *Article 67*
> *Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty*
>
> 1. The notification provided for under article 65, paragraph 1, must be made in writing.
>
> 2. Any act of declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty or of paragraphs 2 or 3 of article 65 shall be carried out through an instrument communicated to the other parties. If the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers." [emphasis added]

535. The Tribunal is aware that some EU Member States have embarked on the process of modifying and/or terminating their intra-EU BITs, while others have not. For their part, Croatia and the Netherlands have signed a political declaration (together with other EU

Member States) regarding the consequences of the *Achmea* judgment, but have not yet terminated the Treaty. Instead, they have committed to do so by the end of this year. Consequently, the procedure set out in Articles 65-67 of the VCLT has not yet been followed and the Treaty has not been invalidated and/or terminated pursuant to the VCLT.

536. The Tribunal adds, for completeness, that, even if Croatia and the Netherlands had completed the procedure set out in Articles 65-67 of the VCLT (*quod non*), this would not have affected in any way the arbitration agreement which is the foundational basis of this Tribunal's jurisdiction.

537. First, the Tribunal recalls that, pursuant to Article 70 of the VCLT, the termination of a treaty as a rule only produces effects for the future. Consequently, it would not affect the validity of arbitration agreements that were concluded prior to the termination of the Treaty, including the one concluded between Claimant and Respondent.

538. Second, even if Article 9 of the Treaty had been invalidated on account of its incompatibility with EU law, this would not have affected arbitration agreements that were concluded in good faith. Pursuant to Article 69 of the VCLT:

> "*Article 69*
> *Consequences of the invalidity of a treaty*
>
> 1. A treaty the invalidity of which is established under the present Convention is void. The provisions of a void treaty have no legal force.
>
> 2. If acts have nevertheless been performed in reliance on such a treaty:
> (a) each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed;
> (b) acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty.
>
> 3. In cases falling under article 49, 50, 51 or 52, paragraph 2 does not apply with respect to the party to which the fraud, the act of corruption or the coercion is imputable.
>
> 4. In the case of the invalidity of a particular State's consent to be bound by a multilateral treaty, the foregoing rules apply in the relations between that State and the parties to the treaty." [emphasis added]

539. In other words, pursuant to Article 69(2)(b) of the VCLT, even if the invalidation of a treaty operates retroactively and the parties to a treaty may be required to reestablish the position that would have existed if the treaty had not been performed, this does not, in and of itself, invalidate "acts performed in good faith before the invalidity was invoked" if such acts were performed "in reliance on such a treaty".

540. The Tribunal considers that the arbitration agreement concluded between Claimant and Respondent represents one such act. In this respect, the Tribunal recalls that, in the case of standing offers to arbitrate included in bilateral investment treaties, the arbitration agreement is concluded upon the acceptance of such offer by the investor, through the initiation of arbitration proceedings. In the case *sub judice*, the arbitration agreement between Claimant and Respondent was perfected on 14 January 2015 by the filing of the Request for Arbitration. At that time, the *Achmea* judgment had not yet been rendered and tribunals constituted under intra-EU BITs were unanimous that there was no incomptability between such BITs and EU law. Fully cognizant of this jurisprudence, Respondent did not challenge this Tribunal's jurisdiction on the basis of Article 9's incompatibility with EU law in the initial stages of this arbitration. It was only after the *Achmea* judgment was rendered (*i.e.*, in April 2018, four years after the conclusion of the arbitration agreement) that Respondent objected to this Tribunal's jurisdiction by invoking Article 9's incompatibility with EU law. The Tribunal thus finds that both Respondent's offer to arbitrate included in the Treaty and Claimant's acceptance of that offer were made in good faith, and in reliance upon the compatibility with EU law of arbitration agreements based on intra-EU BITs.

541. On the basis of the above, the Tribunal considers that the arbitration agreement concluded between Claimant and Respondent represents an "act performed in good faith before invalidity was invoked" and "in reliance on" the Treaty.

542. Consequently, even if the Tribunal were to assume: (i) that the *Achmea* judgment is binding upon it (*quod non*); (ii) that Respondent successfully invoked a ground for challenging the validity of the Treaty and/or Article 9 thereof which is recognized under the VCLT (*quod non*); and (iii) that the procedure for the termination and/or invalidation of a Treaty in Articles 65-67 VCLT had been followed by Respondent (*quod non*), this would not affect this Tribunal's jurisdiction over the present arbitration for two reasons: (i) the termination of the Treaty would produce effects for the future only and would not affect the arbitration agreement already concluded between Claimant and Respondent; and (ii) the invalidation of the Treaty and/or Article 9 thereof, even if retroactive, would not affect the arbitration agreement concluded in good faith between Claimant and Respondent upon the initiation of these arbitral proceedings.

543. The Tribunal considers that the above conclusion is further confirmed by Article 25(1) of the ICSID Convention, pursuant to which once "the parties have given their consent [to arbitration under the ICSID Convention], no party may withdraw that consent unilaterally". Pursuant to the unambiguous terms of Article 25(1) of the ICSID Convention, once consent to arbitration has been given and has been accepted by an investor through the initiation of

arbitral proceedings, this consent may not be withdrawn unilaterally by the respondent State.

544. The principle of legal certainty, which is embodied in both Article 69(2)(b) of the VCLT and in Article 25(1) of the ICSID Convention, entitles investors to legitimately rely upon a State's written consent to arbitrate disputes as long as that consent has not been withdrawn prior to its acceptance by the investor through the proper procedures in the underlying treaty or in the VCLT. This conclusion is doubly apposite in the case *sub judice*, where, by the express terms of Article 9(3) of the Treaty, Croatia "[gave] its unconditional consent to the submission of disputes as referred to in Paragraph 1 of this Article to international arbitration" [emphasis added]. Respondent must have been aware that this wording in Article 9 of the Treaty would induce reliance on the part of investors.

545. For all the reasons set out in the paragraphs above, the Tribunal concludes that, even if the *Achmea* judgment were binding upon it (*quod non*), it would not deprive it of jurisdiction under the Treaty and the ICSID Convention on account of a purported invalidity of its consent to be bound by the Treaty and/or its Article 9.

iii. The second prong of Respondent's objection: Whether Article 9 is inapplicable to the present dispute by operation of Article 30 of the VCLT

546. Respondent argues that the dispute settlement provision contained in Article 9 of the Treaty is inapplicable because it has been superseded by the TFEU pursuant to Article 30(3) of the VCLT. According to Respondent, Article 30 of the VCLT, which deals with the "Application of Successive Treaties relating to the Same Subject-Matter", "codifies the *lex posterior* principle as the rule to be used for resolution of conflict of treaties and provides that where parties to an earlier treaty are also parties to a later treaty … the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty".[6] While the Treaty entered into force on 28 April 1998, Croatia became a Member State of the EU only on 1 July 2013. Therefore, Respondent asserts, the Treaty of Accession of Croatia, which makes Croatia a party to the TFEU, and entered into force on 1 July 2013, is the later of the two treaties concluded by the Netherlands and Croatia and supersedes the Treaty's dispute settlement clause.

547. The Tribunal recalls that Article 30 of the VCLT provides as follows in relevant part:

> "1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.

[6] R-Ach2, at 13.

> […]
>
> 3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty." [emphasis added]

548. The Tribunal considers that, for Article 30 of the VCLT to apply, two conditions must be met: (i) the two treaties must relate to the same subject-matter; and (ii) the treaties, or parts thereof, must be incompatible. If one of those conditions is not fulfilled, *i.e.*, if the treaties do not relate to the same subject-matter or if they are compatible, Article 30 does not apply. The first question before the Tribunal, therefore, is whether the Treaty and the TFEU relate to the same subject-matter. If the Tribunal determines that they do not, such determination will be sufficient to defeat this prong of Respondent's objection.

549. The Tribunal notes that the *Achmea* judgment found that arbitration clauses, such as Article 9 of the Treaty, are incompatible with Articles 267 and 344 of the TFEU. The CJEU however, did not discuss the application of Article 30 of the VCLT, which is not even mentioned in the *Achmea* judgment. Therefore, in analyzing the question whether the Treaty and the TFEU relate to the same subject-matter, the issue of the binding or non-binding nature of the CJEU's conclusions in *Achmea* does not arise.

550. The gist of Respondent's position is that the application of Article 30 of the VCLT requires only that the application of the rules of two different treaties lead to incompatible results, rather than requiring an identity of subject-matter between the earlier and the later treaties. The Tribunal disagrees. Respondent's argument essentially collapses the two conditions set forth in Article 30 of the VCLT into one. Unpacked, the logic of Respondent's argument is as follows: the two treaties are incompatible (because their application leads to incompatible results); therefore, the two treaties relate to the same subject-matter; therefore, Article 30 applies.

551. This is not, however, what Article 30 says. As discussed above, Article 30 sets forth two independent conditions: (i) the two treaties must relate to the same subject-matter; and (ii) they must be incompatible. Respondent's argument removes the first condition and thus makes it superfluous. The Tribunal does not believe that this is a proper interpretation of Article 30 of the VCLT because it reads the first condition out of its text, which is contrary to the principle of *effet utile*. Adopting Respondent's interpretation of Article 30 of the VCLT would essentially require that the Tribunal rewrite its text, which is not within the Tribunal's powers to do.

552. The Tribunal, therefore, will turn to the first condition: the question whether the two successive treaties (in this case, the Treaty and the TFEU) relate to the same subject-matter. First, the Tribunal does not believe that the relevant benchmark for determining "the same subject-matter" is whether the two successive treaties apply to the same set of facts or whether they have the same goal. The Tribunal agrees with the analysis of the *EURAM v. Slovakia* tribunal, which stated:

> "Even if two different rules deal with issues arising from the same facts, it does not necessarily mean that they have the same subject matter. This can be seen from a simple example: a treaty on environmental protection and a treaty on trade may both apply to the same factual situation but the subject matter with which they deal is quite different.
>
> Secondly, […] it is [not] sufficient for two treaties to have the same goal for them to have the same subject matter. For example, two treaties can each have the goal of enhancing the well-being of children, one in providing for an international mechanism of monitoring of child labor, another in deciding that children under fourteen may not be married against their will. Yet no reasonable person would consider that those two treaties, although pursuing the same goal, the same overall purpose, have the same subject matter." [7]

553. Respondent argues that the Treaty and the TFEU relate to the same subject-matter because they deal with foreign investment activity and include rules for foreign investment regulation. Respondent adds that the two successive treaties serve the same purposes, offer the same standards of protection and provide equivalent remedies. Investment arbitration tribunals have consistently rejected this argument. The Tribunal sees no basis to depart from the consistent jurisprudence of investor-State tribunals that intra-EU BITs and the EU treaties deal with different subject matters.[8]

554. The Tribunal agrees with the *EURAM v. Slovakia* tribunal that the subject-matter of a treaty is determined by the issues with which its constituent provisions deal, *i.e.*, its topic or substance. Similarly to the *Oostergetel v. Slovakia* and *EURAM v. Slovakia* tribunals, the Tribunal considers that the EU treaties' objective is to promote economic integration, including by creating a common market, among the Member States, whereas the objective of BITs (including the Treaty) is to provide for specific guarantees in order to encourage the international flows of investment into particular States. Further, the Tribunal is not persuaded that the substantive protections afforded to a foreign investor under the Treaty are comparable to, or of the same nature as, those offered under the EU treaties. For example, the Tribunal is not persuaded that the Treaty's FET standard is coextensive with the fundamental EU freedoms or that EU law specifically forbids treatment that is not fair and equitable. As the *Eureko v. Slovakia* tribunal concluded, the protections afforded by

[7] EURAM v. Slovakia, at 169, 170.
[8] *See*, Eastern Sugar v. Czech Republic, at 159-164; Oostergetel v. Slovakia, at 74-79; EURAM v. Slovakia, at 178-184.

BITs under the FET standard are not exhausted by the existing EU law provisions prohibiting discrimination.[9] Respondent has not carried its burden to demonstrate otherwise. Further, while EU law may condition expropriatory takings on public interest and fair compensation requirements, Respondent has not established that it offers comparable protections to those available under the Treaty in the case of indirect expropriations, or that it applies to "every kind of asset".

555. In sum, the Tribunal is not convinced that the relevant provisions of EU law guaranteeing the fundamental freedoms or prohibiting discrimination have the same topic or substance as the substantive protections offered under the Treaty. The potential simultaneous application of EU law and the Treaty to the same set of facts is not sufficient to conclude that the Treaty and EU law have the same subject matter.

556. The Tribunal therefore finds that Article 30 of the VCLT does not apply and, consequently, does not render Article 9 of the Treaty inapplicable.

iv. The third prong of Respondent's objection: Whether Article 9 is inapplicable to the present dispute by operation of Article 351 TFEU

557. Article 351 of the TFEU provides as follows in relevant part:

> "(1) The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties.
>
> (2) To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude."

558. Respondent accepts that Article 351(1) of the TFEU applies to agreements entered into by an EU Member State with third countries before the accession of that Member State to the EU and, thus, deals only with relations between EU Members and non-EU States without addressing relations between EU Member States. Respondent argues that, according to the *Electrabel v. Hungary* tribunal, a negative interpretation of Article 351 of the TFEU demonstrates that inconsistent earlier treaties between Member States should not survive entry into the European Union and, therefore, EU law prevails in case of inconsistency with another earlier treaty.

[9] Eureko v. Slovakia, at 250.

559. Regardless of whether Article 351 of the TFEU can be subject to a "negative interpretation", on which issue this Tribunal expresses no views, the Tribunal cannot see how, on the basis of the ordinary meaning of the text of Article 351 TFEU, it could be concluded that the earlier treaties and agreements between Croatia and other States (be they EU Member States or not) are automatically superseded by EU law. Article 351 of the TFEU does not state that, in case of incompatibilities, EU law prevails or that the earlier agreement is invalid. It simply requires the Member States concerned to take steps to eliminate incompatibilities.

560. Moreover, the Tribunal agrees with Claimant that, even if one were to endorse the interpretation of Article 351 of the TFEU adopted by the *Electrabel v. Hungary* tribunal, Respondent's jurisdictional objection would still fail. Indeed, as pointed out by Claimant, the *Electrabel v. Hungary* tribunal conducted its analysis under Article 351 of the TFEU on the assumption that the two successive treaties (in that case, the Energy Charter Treaty and the EU treaties) had the same subject-matter:

> "4.176. As regards the substantive protections in Part III of the ECT, the Tribunal does not consider that the ECT and EU law share the same subject-matter; and, accordingly, it considers that Article 16 ECT is inapplicable.
>
> […]
>
> 4.178. Article 307 EC (Article 351 TFEU): Assuming the same subject-matter, the Tribunal decides that Article 16 ECT would still be inapplicable because the conflict rule of the later treaty would apply, namely Article 307 EC."[10] [internal citations omitted] [emphasis added]

561. In other words, that tribunal's observations with regard to Article 351 of the TFEU were made *obiter* on the basis of an assumption of both identity of subject-matter and incompatibility, which the tribunal had already decided did not exist in the case.

562. This Tribunal has already determined that the Treaty and the EU treaties do not have the same subject-matter and thus do not fall within the ambit of Article 30(3) of the VCLT. In line with the principle of judicial economy, the Tribunal does not consider it necessary to repeat those considerations here, in the context of Article 351 of the TFEU. Suffice it to say for the purposes of the present analysis that Article 351 of the TFEU does not apply in this case for the same reasons as Article 30(3) of the VCLT does not apply.

563. For all the reasons identified above, the Tribunal finds that the arbitration clause included in Article 9 of the Treaty continues to be applicable. Therefore, Respondent's Objection No. 1 is hereby dismissed.

[10] Electrabel v. Hungary Decision on Jurisdiction, at 4.176, 4.178.

v. Potential issues with enforcement

564. The Tribunal has taken note of the Parties' arguments with respect to the problems that may arise if the Tribunal upholds jurisdiction notwithstanding the *Achmea* judgment and the Award is presented for enforcement either within or outside of the European Union. The Tribunal is of course aware that it is preferable to render an award that is easily enforceable. But the Tribunal does not agree with the proposition that the Tribunal's jurisdiction must be contingent on the absence of potential issues at the enforcement stage. This Tribunal's jurisdiction is not determined by national rules governing the enforcement of arbitral awards, but by the Treaty, the ICSID Convention, and international law.

565. Two further considerations should be borne in mind. First, the ICSID Convention provides for a self-contained dispute resolution mechanism that does not allow national courts to play any role in reviewing an ICSID award. Pursuant to Article 54(1) of the ICSID Convention, "[e]ach Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State". Thus, domestic courts are not allowed to exercise judicial review of ICSID awards, during the enforcement process or otherwise.

566. Second, the fact that execution of awards is subject to the laws governing the execution of judgments in force in the respective State (pursuant to Article 54(2)) or that "[n]othing in Article 54 [relating to enforcement of an ICSID award] shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution" (pursuant to Article 55), has not deterred ICSID tribunals from routinely rendering awards against States. It will be up to the courts at the enforcement stage to assess the effects of the *Achmea* judgment, if any, on the enforceability of this Award within their respective jurisdictions.

vi. Conclusion

567. On the basis of the foregoing, the Tribunal concludes that the *Achmea* judgment does not preclude it from exercising the jurisdiction granted to it pursuant to Article 9 of the Treaty and Article 25 of the ICSID Convention. Respondent's Objection No. 1 is hereby dismissed.

2. Objection No. 2: Whether Tribunal has jurisdiction ratione voluntatis and/or ratione personae

568. On a preliminary note, the Tribunal observes that Respondent's main argument under both the objection to jurisdiction *ratione voluntatis* and the objection to jurisdiction *ratione materiae* is that Claimant is a "passive", as opposed to an "active", investor. The Tribunal considers that Respondent's objection to jurisdiction *ratione voluntatis* is, at its core, an objection to jurisdiction *ratione personae*: by arguing that Croatia never agreed to arbitrate disputes with entities that did not "make" an investment, Respondent is essentially challenging Claimant's status as an investor. Moreover, the objection to jurisdiction *ratione personae* is inextricably connected with the objection to jurisdiction *ratione materiae*: arguing that Claimant is not an investor because it did not "make" an "investment" is just another way of saying that Claimant did not make the "investment".

569. For the reasons set out in more detail in the paragraphs below, the Tribunal finds that it has jurisdiction *ratione personae* and/or *ratione voluntatis*. Respondent's objection to jurisdiction *ratione materiae* will be addressed in Section VI.C.3 below.

570. The Tribunal observes that Claimant was incorporated on 31 March 2011 in Amsterdam.[11] Claimant thus meets the definition of the term "national" as per Article 1(b)(ii) of the Treaty:

> "(b) the term 'nationals' shall comprise with regard to either Contracting Party:
>
> […]
>
> (ii) legal persons constituted under the law of that Contracting Party".

571. While Respondent does not dispute that the conditions in Article 1(b) of the BIT are met in the present case, it argues that this is not sufficient for the Tribunal to have jurisdiction over the present dispute. In its view, Article 10 of the Treaty imposes an additional jurisdictional requirement: that the investor be actively involved in the making of the investment. In this respect, Respondent argues that the term "made" in Article 10 of the BIT ("investments, made in the territory of one of the Contracting Parties, in accordance with its legislation, by investors of the other Contracting Party prior to as well as after the entry into force of the present Agreement") demonstrates that the BIT requires that the investor be actively involved in the making of its investment, as opposed to being a mere passive owner of shares. Respondent adds that this interpretation is further supported by the use of the terms "by" in the Preamble ("investments by the nationals of one Contracting Party in the territory of the other Contracting Party") and "of" in Article 9 ("an investment of [a national of the other Contracting Party]").

[11] Certification of Incorporation of B3 Croatian Courier Coöperatief U.A., 31 March 2011 (Exhibit C-406).

572. The Tribunal recalls that the VCLT is applicable in the relationship between Croatia and the Netherlands and both Parties refer to the VCLT as support for their arguments. Thus, the Tribunal shall interpret the Treaty, including its Article 10, in the light of the provisions of the VCLT.

573. The Tribunal is not persuaded that a "good faith" interpretation of the term "made" in Article 10 of the BIT, which takes into account the "ordinary meaning" of the terms employed seen "in their context" and in the light of the "object and purpose" of the Treaty, as per Article 31(1) of the VCLT, supports the interpretation advocated by Respondent.

574. The Tribunal is of the view that the ordinary meaning of the verb "to make" includes the act of acquiring an investment.[12] The verb "to acquire" is defined as "to gain possession or control of; to get or obtain"[13] something. In other words, the emphasis is on the act of obtaining title or possession over something, as opposed to the monetary value exchanged for title or possession. Thus, "making" an investment includes instances in which title or possession over an asset that qualifies as an investment is obtained. Respondent disputes that Claimant acquired the investment at issue in the present case, countering that it merely held it, which is not one of the accepted meanings of the term "to make". The Tribunal disagrees. Claimant acquired (*i.e.*, gained control over) the investment on 1 April 2011, […]. Thus, Claimant's indirect holding of 100% shares in […] is in conformity with the ordinary meaning of the term "made" in Article 10 of the Treaty.

575. Further, the Tribunal considers that the context of the verb "made", as well as the object and purpose of the Treaty, equally demonstrate that Respondent's restrictive interpretation of Article 10 is not supported by the BIT.

576. First, the Tribunal notes that Article 10 specifies that the BIT applies to "investments, made in the territory of one of the Contracting Parties, in accordance with its legislation, by investors of the other Contracting Party prior to as well as after the entry into force of the present Agreement". The Tribunal considers that this provision only sets forth a legal and temporal limitation to the Tribunal's jurisdiction. There is no wording in this text that differentiates between so-called "passive" investors (who merely hold an investment) and "active" investors (who, according to Respondent, are actively involved in the act of the making of an investment).

[12] Black's Law Dictionary (10th ed. 2014), p. 1099 (Exhibit CL-131): "make, vb. (bef. 12c) […] 3. To acquire (something)".
[13] *See*, Black's Law Dictionary (8th ed. 2004), p. 25.

577. Second, the Tribunal also considers that the interpretation advocated by Respondent is at odds with the object and purpose of the Treaty. For instance, the Treaty's Preamble reads in relevant part:

> "Desiring to strengthen their traditional ties of friendship and to extend and intensify the economic relations between them particularly with respect to investments by the nationals of one Contracting Party in the territory of the other Contracting Party."

578. The Tribunal is of the view that Respondent's narrow interpretation of the Treaty in general, and Article 10 in particular, which seeks to limit the Treaty's protections to just one class of investors, *i.e.*, the "active" investors, is in direct conflict with the Preamble's stated purpose of extending and intensifying the economic relations between the Netherlands and Croatia. The Tribunal considers that investments from "passive" investors, for instance, from portfolio investors, equally serve to intensify the flow of capital from one of the Contracting Parties to the BIT to the other and thus meet the stated purpose of the Preamble. The Tribunal finds that the use of the word "by" in the Preamble ("investments by the nationals of one Contracting Party in the territory of the other Contracting Party") does not assist Respondent's case. There is nothing in the meaning of the word "by" that supports Respondent's reading of the Preamble as requiring the active involvement of the investor. The Tribunal considers that, instead, in the context of the Preamble, the word "by" simply establishes a link, an affiliation between the investment and the investor. An investment can be made either by an "active" or by a "passive" investor.

579. The Tribunal further notes that the Treaty's definition of "national" as *inter alia* "legal persons constituted under the law of that Contracting Party" refers to the notion of incorporation. The Tribunal considers that, if the Contracting Parties had wished to limit the categories of investors protected by the BIT to those nationals actively involved in the making of an investment, an easy way to achieve this objective would have been to limit the categories of protected "nationals" to those legal entities with substantial business activities in the State of nationality, or to entities that are managed and/or controlled from within that State. Instead, no such limitation exists in Article 1(b). To the contrary, Article 1(b) seeks to extend the Treaty's protections even further by assimilating to "nationals" those "legal persons not constituted under the law of that Contracting Party but controlled, directly or indirectly, by natural persons as defined in (i) or by legal persons as defined in (ii)". In the Tribunal's view, this latter choice by the Contracting Parties further underscores their desire to broaden the sphere of protected investors. Respondent's interpretation seeks to introduce a limitation to the sphere of protected "nationals" that finds no support in the language of the definition of the term "national".

580. The Tribunal also considers that the use of the word "of" in Article 9 of the Treaty ("Disputes between one Contracting Party and a national of the other Contracting Party concerning an obligation of the former under this agreement in relation to an investment of the latter") likewise does not support Respondent's case. Similarly to the *CEMEX v. Venezuela* tribunal, this Tribunal considers that the word "of" simply connotes the fact that the investments must belong to the investor in order to benefit from Treaty protection.[14] An investment can belong both to an "active" and to a "passive" investor.

581. The Tribunal further observes that the Treaty does not include any other provision clearly limiting the categories of protected investors to "active" investors.

582. For all these reasons, the Tribunal finds that Article 10 of the BIT and the BIT more broadly do not require investors to be actively involved in the making of the investment in order to qualify for Treaty protection. Claimant is a protected investor and Respondent's objection to jurisdiction *ratione personae* is thus dismissed. For the same reasons, the Tribunal also considers that the language of the Treaty and the evidentiary record do not support Respondent's contention that Croatia's offer to arbitrate was only addressed to "active", as opposed to "passive", investors. Thus, even if the Tribunal were to accept that Respondent's arguments can more adequately be characterized as an objection to jurisdiction *ratione voluntatis* (*quod non*), that objection would still be dismissed.

3. Objection No. 3: Whether the Tribunal lacks jurisdiction ratione materiae

583. Article 1(a) of the BIT provides:

> "For the purposes of this Agreement:
> (a) the term 'investments' means every kind of asset and more particularly, though not exclusively:
>
> (i) movable and immovable property as well as other rights in rem in respect of every kind of asset;
>
> (ii) rights derived from shares, bonds and other kinds of interests in companies and joint ventures;
>
> (iii) claims to money, to other assets or to any performance having an economic value;
>
> (iv) rights in the field of intellectual property, technical processes, goodwill and know-how;

[14] CEMEX v. Venezuela, at 157.

> (v) rights granted under public law or under contract, including rights to prospect, explore, extract and win natural resources."

584. Respondent does not dispute that Claimant's indirect shareholding in […] meets the definition of "investment" included in the BIT. Respondent however argues that this is not sufficient to establish jurisdiction *ratione materiae*, as Claimant's investment must also meet the objective and inherent meaning of the term "investment" in Article 25(1) of the ICSID Convention. Respondent posits that this meaning is that of "[a]n expenditure to acquire property or assets to produce revenue; a capital outlay"[15] or "[t]he conversion of money or circulating capital into some species of property from which an income or profit is expected to be derived in the ordinary course of trade or business".[16] Respondent considers that the Tribunal should look to certain benchmarks (contribution, duration and risk) in order to determine whether a certain operation qualifies as an "investment" under Article 25(1) of the ICSID Convention. Claimant, on the other hand, argues that the definition of the term "investment" in the BIT should inform the Tribunal's understanding of the term "investment" under Article 25(1) of the ICSID Convention. In its view, holding shares in a local Croatian company satisfies the requirements of Article 25(1) of the ICSID Convention.

585. The Tribunal recalls that the meaning of the term "investment" under Article 25(1) of the ICSID Convention has been, and remains, one of the most disputed issues in investment arbitration to date. As shown below, when interpreting this term, the Tribunal finds very little guidance in the text of the ICSID Convention itself or in its drafting history.

586. The Tribunal considers that the interpretation of the term "investment" in Article 25(1) of the ICSID Convention must be accomplished by reference to the provisions of the VCLT, beginning with Article 31(1)'s prescription that a treaty must be interpreted in good faith, in accordance with the ordinary meaning of the terms employed, seen in their context and in the light of the object and purpose of the treaty. The Tribunal aligns itself with the *Ambiente Ufficio v. Argentina*[17] and *Philip Morris v. Uruguay* tribunals, which found that the ordinary meaning of the term "investment" "covers a wide range of economic operations" and has a "broad scope of … application, subject to the possibility for States to restrict jurisdiction *ratione materiae* by limiting their consent either in their investment legislation or in the applicable treaty".[18]

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[15] B. Garner, *Black's Law Dictionary*, 9th ed. West Group, 2009 (Exhibit RL-62).
[16] Oxford English Dictionary (online ed.), definition of "investment" (Exhibit RL-69).
[17] *Ambiente Ufficio S.p.A. and others (formerly Giordano Alpi and others) v. Argentine Republic* (ICSID Case No. ARB/08/9), Decision on Jurisdiction and Admissibility, 8 February 2013 (Exhibit CL-159) ("Ambiente Ufficio v. Argentina").
[18] Philip Morris v. Uruguay Decision on Jurisdiction, at 200; *See also*, Ambiente Ufficio v. Argentina, at 456.

587. The context in which the term "investment" is placed within the ICSID Convention, as well as the object and purpose of this international agreement, do not provide particularly helpful guidance in this analysis. The Preamble of the ICSID Convention refers to "the need for international cooperation for economic development and the role of private international investment therein", and to the "important … role of foreign investment in the economic development process", which could be construed both as supporting a broad meaning for the term "investment", and a narrower one.

588. As pointed out by the *Ambiente Ufficio v. Argentina* tribunal, little guidance can be derived from subsequent State practice (Article 31(3)(b) of the VCLT) or from pertinent case law (even assuming that other arbitral awards can be considered to be "judicial decisions" within the meaning of Article 38(d) of the Statute of the International Court of Justice). The definitions of "investment" in international investment treaties and domestic investment legislation vary considerably, as does the jurisprudence on the matter.

589. What is nevertheless clear from both the ordinary meaning of the term "investment", from subsequent State practice and relevant arbitral jurisprudence is that the term has so-called "outer limits". These are usually understood to exclude ordinary commercial transactions, such as one-off sale agreements, from the sphere of application of the ICSID Convention. The Tribunal considers that, within the bounds of these limits, the States' agreement on the meaning of the term "investment", to be found in international investment agreements or domestic investment legislation, should be afforded due weight. In the words of the *Alpha v. Ukraine* tribunal:

> "[T]he Tribunal does not contend that any definition of 'investment' that might be agreed by States in a BIT (or by a State and an investor in a contract) must constitute an 'investment' for purposes of Article 25(1). To cite the classic example, a simple contract for the sale of goods, without more, would not constitute an investment within the meaning of Article 25(1), even if a BIT or a contract defined it as one. However, when the State party to a BIT agrees to protect certain kinds of economic activity, and when the BIT provides that disputes between investors and States relating to such activity may be resolved through ICSID arbitration, it is appropriate to interpret the BIT as reflecting the State's understanding that that activity constitutes an 'investment' within the meaning of the ICSID Convention as well. That judgment, by States that are both parties to the BIT and Contracting States to the ICSID Convention, is entitled to great deference."[19] [internal citations omitted]

590. The Tribunal also recalls that the drafters of the ICSID Convention deliberately decided to leave the term "investment" undefined, as shown in the 1965 Report of the Executive Directors on the ICSID Convention:

[19] Alpha v. Ukraine, at 313.

> "No attempt was made to define the term 'investment' given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (Article 25(4))."[20]

591. The *Ambiente Ufficio v. Argentina* tribunal aptly summarized the background to the adoption of Article 25(1) of the ICSID Convention:

> "449. To begin with, the statement must be qualified inasmuch as several, though unsuccessful, attempts at defining the term 'investment' had actually been made in the negotiation process leading to the adoption of the ICSID Convention in 1965. In fact, the question of whether and how to define the concept of 'investment' was one of the most contentious issues in that process. While a first camp, mostly consisting of developed (viz. capital-exporting) States, proposed to abstain from any definition of investment and to leave that matter entirely to the consent of the States involved, another group of States, dominated by developing (viz. capital-importing) States, was strongly in favour of a precise and narrow definition that would limit the Convention's scope of application *ratione materiae* to a well-defined (and if possible even exhaustive) list of protected investments. When the negotiations were on the brink of failure due to the stalemate between the two camps, a compromise proposal introduced by the United Kingdom brought the breakthrough, permitting that in the final vote the Convention was adopted by an overwhelming majority.
>
> 450. This compromise proposal sought to take account of the concerns of both camps. To this effect, it combined two aspects: On the one hand, it opted for the bare use of the term 'investment'. This was a concession to the proponents of the non-definition approach, implying that the Convention would impose no, or only very weak, limits as to the jurisdiction *ratione materiae* of the Centre regarding the question whether a certain economic operation would qualify as an investment under Art. 25 of the ICSID Convention.
>
> 451. On the other hand, this liberal approach was complemented, and contained, by the establishment of a mechanism by which (namely the capital-importing) States could withhold matters from the jurisdiction of the Centre which they considered inappropriate to be dealt with by this institution. The immediate result of the move to accommodate these States' concerns was the introduction of Art. 25(4) of the ICSID Convention – a provision which was not in the Convention's draft before. It permits any Contracting State, before or after ratification of the Convention, to 'notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre […] Such notification shall not constitute the consent required by paragraph (1).'
>
> 452. States had therefore the possibility of restricting the Centre's jurisdiction *ratione materiae* to economic operations and assets which they considered to constitute investments, by giving or not giving consent or by qualifying their consent with certain restrictions – be it via their domestic investment legislation or via the applicable BIT. In addition, notifications under Art. 25(4) of the ICSID Convention allowed States to make announcements in general terms as to the types of disputes in respect of which they would

[20] Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention, nr. 27.

> consider giving consent. While such notifications do not amount to limiting as such the jurisdiction *ratione materiae* of the Centre and while those notifications cannot replace the specific consent to arbitration required under Art. 25 (see its afore-cited para. 4, final sentence), they may have an indirect bearing on jurisdiction: a consent clause which is not entirely clear may be interpreted by reference to a prior notification of classes of disputes in respect of which the host State has expressed its intentions. Accordingly, the consent of the parties as to the scope of the term 'investment' is to be deemed of great relevance when establishing the meaning of Art. 25 of the ICSID Convention, without the concept thus becoming subject to the parties' unfettered discretion."[21] [internal citations omitted] [emphasis in original]

592. In other words, for the drafters of the ICSID Convention, the issue of the Contracting Parties' consent was crucial. However, the Contracting Parties did not (and do not) have unfettered discretion when establishing the meaning of the term "investment".

593. The Tribunal notes that the Parties' positions reflect the two schools of thought on the meaning of the term "investment" under Article 25(1) of the ICSID Convention. While Claimant considers that the definition of the term "investment" in the BIT should be given considerable weight when interpreting Article 25(1) of the ICSID Convention, Respondent counters that, beyond any definition included in the Treaty, the term "investment" has an inherent meaning, entailing contribution, duration and risk.

594. The Tribunal, after examining the evidence before it, concludes that, whether one adopts the interpretation propounded by Claimant or the one put forth by Respondent, the answer remains the same: Claimant made a qualifying "investment" and the objection to jurisdiction *ratione materiae* is dismissed.

595. In particular, if the Tribunal were to adopt the interpretation put forward by Claimant, Claimant's indirect shareholding in […] would qualify as an "investment" under Article 25(1) of the ICSID Convention.

596. It has already been mentioned that Claimant's indirect shareholding in […] meets the definition of the term "investment" in Article 1(a)(2) of the Treaty: "a) the term 'investments' means every kind of asset and more particularly, though not exclusively: […] (ii) rights derived from shares, bonds and other kinds of interests in companies and joint ventures".

[21] Ambiente Ufficio v. Argentina, at 449-452.

597. Under this interpretation, considering that the jurisdictional requirements in the underlying investment treaty are satisfied, it would take exceptional circumstances to refuse to exercise jurisdiction on the basis of Article 25(1) of the ICSID Convention:[22]

> "In the Tribunal's view, the four constitutive elements of the *Salini* list do not constitute jurisdictional requirements to the effect that the absence of one or the other of these elements would imply a lack of jurisdiction. They are typical features of investments under the ICSID Convention, not 'a set of mandatory legal requirements'. As such, they may assist in identifying or excluding in extreme cases the presence of an investment but they cannot defeat the broad and flexible concept of investment under the ICSID Convention to the extent it is not limited by the relevant treaty."[23] [internal citations omitted] [emphasis added]

> "The Tribunal recognizes that elements discussed in the *Salini* test might be of some use if a tribunal were concerned that a BIT or contract definition of 'investment' was overreaching and captured transactions that manifestly were not investments under any acceptable definition. Indeed, a number of tribunals and *ad hoc* committees have treated the *Salini* elements as non-binding, non-exclusive means of identifying (rather than defining) investments that are consistent with the ICSID Convention. However, in most cases […] it will be appropriate to defer to the States' definition of investment in a BIT or a contract."[24] [internal citations omitted] [emphasis added]

> "[T]he criteria assembled in the *Salini* test, while not constituting mandatory prerequisites for the jurisdiction of the Centre in the meaning of Art. 25 of the ICSID Convention, may still prove useful, provided that they are treated as guidelines and that they are applied in conjunction and in a flexible manner. In particular, they may help to identify, and exclude, extreme phenomena that must remain outside of even a broad reading of the term 'investment' in Art. 25 of the ICSID Convention. Nonetheless, the basic character, and rationale, of the 'non-definition' of investment allow Art. 25(1) of the ICSID Convention to cover a wide range of economic operations and assets, susceptible to include non-standard and atypical investments and capable of adapting to the evolving nature of economic activity."[25] [internal citations omitted] [emphasis added]

598. In the case *sub judice*, Croatia and the Netherlands have agreed to protect investments consisting of "rights derived from shares, bonds and other kinds of interests in companies and joint ventures". The Tribunal considers that there are no exceptional circumstances present in this case that could justify a decision to decline jurisdiction and thus effectively override Croatia's and the Netherlands' agreement to arbitrate disputes pertaining to Claimant's shareholding.

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[22] The Tribunal notes that, in any event, even if the Tribunal were to follow the *Salini* criteria, Claimant's indirect shareholding in […] would still meet these criteria.
[23] Philip Morris v. Uruguay Decision on Jurisdiction, at 206.
[24] Alpha v. Ukraine, at 313.
[25] Ambiente Ufficio v. Argentina, at 481.

599. First, the Tribunal finds that Claimant's alleged lack of active involvement in the making of the investment cannot be construed as one such exceptional circumstance. Indeed, as concluded in Section VI.C.2 above, the Treaty does not include a requirement that the investor be actively involved in the making of an investment. These observations, made in the context of Respondent's objection to jurisdiction *ratione personae*, are also pertinent for an analysis of jurisdiction *ratione materiae*: there is nothing in the Treaty to support Respondent's interpretation that only "investments" made by "active", as opposed to "passive", investors are protected. The Treaty's protections extend to investments "made", *i.e.*, "acquired", by passive investors. The Treaty does not exclude from its protections the investments owned by holding companies.

600. Second, the Tribunal does not consider the use of a private equity fund for the making of the investment an exceptional circumstance that could justify a departure from the Contracting Parties' understanding that rights derived from shares should be entitled to protection under the BIT and the ICSID Convention. The Tribunal notes that the Treaty does not include any requirements as to the source of the funds used for making an investment. Arbitral case law has been consistent in its conclusion that, absent specific language in the underlying treaty, the origin of the funds employed by an investor for making an investment (*i.e.*, the investor's own funds, funds from affiliates, funds from financing entities) is irrelevant. Moreover, the investment structure that was employed in this case is fairly typical and commonly encountered in the case of foreign investments. In this respect, the Tribunal understands that, typically, for the purpose of individual investment projects or for categories of investment projects, private equity funds set up individual funds that act as capital-pooling entities. […]

601. Third, the Tribunal also observes, for completeness, that indirectly holding shares in a company cannot be deemed to go beyond the so-called "outer limits" of Article 25(1) of the ICSID Convention, as it is not in any way equivalent to ordinary commercial transactions, such as one-off sale agreements.

602. In other words, if the Tribunal were to endorse Claimant's interpretation of the term "investment" in Article 25(1) of the ICSID Convention, there would be no compelling rationale for the Tribunal to consider that the Netherlands' and Croatia's definition of "investment" in Article 1 of the Treaty is excessively broad, an "extreme phenomen[on] that must remain outside of even a broad reading of the term 'investment' in Art. 25 of the ICSID Convention",[26] or that the "definition of 'investment' [in the BIT] [is] overreaching and capture[s] transactions that manifestly [are] not investments under any acceptable

[26] Ambiente Ufficio v. Argentina, at 481.

definition".[27] The Tribunal would thus find that the definition of "investment" in Article 1(a) of the BIT falls squarely within the bounds of the term "investment" included in Article 25(1) of the ICSID Convention and must be respected by upholding jurisdiction *ratione materiae* in this case.

603. If the Tribunal were to adopt the interpretation put forward by Respondent and find that the term "investment" has an inherent meaning, encompassing contribution, duration and risk, the conclusion would remain the same: Claimant has made an investment and the objection to jurisdiction *ratione materiae* must be dismissed.

604. In particular, with respect to the issue of a contribution, the Tribunal finds that Claimant's contribution consisted of its indirect ownership of shares in […], the follow-on investments made in order to keep the company afloat and the management of […]. Moreover, and in any event, as part of its ongoing investment in […], Claimant made a series of capital expenditures […] as follow-on investments and managed and controlled […] through the appointment of its Managing Directors […]. These elements are sufficient, in the Tribunal's view, to qualify as a "contribution".

605. With respect to the element of duration, the Tribunal observes that Claimant's investment entailed a certain duration: after acquiring shares in […] in March 2011, Claimant continued to hold these shares for a number of years, throughout the series of events pertinent for this arbitration.

606. Claimant's indirect ownership of shares in […] also involved an element of risk, namely the risk that […] business might fail and the funds injected into the company would be lost.

607. For these reasons, the Arbitral Tribunal concludes that, even if it were to endorse Respondent's interpretation of the term "investment" in Article 25(1) of the ICSID Convention, Respondent's objection to jurisdiction *ratione materiae* would still be dismissed.

608. In conclusion, regardless of whether the Arbitral Tribunal adopts the interpretation of the term "investment" put forward by Claimant or the one put forward by Respondent, the result remains the same: Claimant has made a qualifying "investment" under Article 25(1) of the ICSID Convention and the objection to jurisdiction *ratione materiae* is dismissed.

[27] Alpha v. Ukraine, at 313.

4. Objection No. 4: Whether the Tribunal lacks jurisdiction ratione temporis over claims pre-dating 1 April 2011

609. Respondent argues that the Treaty does not apply to conduct that pre-dated Claimant's investment in […] and relies upon Article 28 of the VCLT as support for its objection. Claimant does not appear to dispute the merits of Respondent's objection.

610. The Tribunal agrees with Respondent, albeit it cannot endorse the legal basis of its jurisdictional objection.

611. Article 28 of the VCLT sets out the principle of non-retroactivity of treaties:

> "*Article 28: Non-retroactivity of treaties*
> Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party." [emphasis in original]

612. It is not in dispute between the Parties that the Treaty entered into force on 1 June 1999. The conduct with respect to which Respondent raises this jurisdictional objection dates from 2003 until 2011. In other words, it is not a question of the Treaty being applied retroactively to events which took place prior to its entry into force.

613. The Tribunal considers that Respondent's objection to jurisdiction *ratione temporis* pertains to the inapplicability of the Treaty's substantive standards of protection prior to the making of an investment, as well as to the inexistence of a dispute with respect to an investment, as per Article 9(1) of the Treaty: "[d]isputes between one Contracting Party and a national of the other Contracting Party concerning an obligation of the former under this agreement in relation to an investment of the latter". The Tribunal agrees with Respondent that it has no jurisdiction over conduct occurring prior to Claimant making its investment, but the legal basis of this finding is Article 9(1) of the Treaty.

614. More precisely, in the case *sub judice*, Claimant made its investment on 1 April 2011, when, subsequent to its purchase of the totality of the shares in […].

615. Consequently, the Tribunal does not have jurisdiction *ratione temporis* over events which took place prior to 1 April 2011, and in particular over claims that:
- The Ministry of Transport and HAKOM gave contradictory interpretations of hybrid mail services with the intent to extend […] monopoly over reserved services;
- […] interfered in the drafting of the 2009 PSA; and

– HAKOM failed to ensure that […] implemented a separate cost accounting model for its regulatory accounts under the 2003 PSA.

616. The Tribunal finds however that it does have jurisdiction over Claimant's claims concerning Respondent's treatment of value-added services under the 2009 PSA and Respondent's failure to ensure that […] implemented separate cost accounting under the 2009 PSA. While the conduct pertaining to these claims began before Claimant made its investment (in March 2010, in the case of the value-added services claim; and in 2009, upon the entry into force of the 2009 PSA, in the case of the separate cost accounting claim), the conduct continued well after Claimant had made its investment. In the case of Claimant's claim pertaining to value-added services, HAKOM's decision finding […] in breach of the 2009 PSA was issued on 18 May 2012, after Claimant had made its investment. In the case of Claimant's claim pertaining to separate cost accounting, […] only fulfilled this obligation in May 2014. The Tribunal concludes that it has jurisdiction over these complex or continuous acts, which begun before Claimant made its investment but continued well after that moment.

§

617. Having dismissed Respondent's jurisdictional objections, the Tribunal therefore finds that it has jurisdiction under the ICSID Convention and the Treaty.

VII. WHETHER CROATIA BREACHED ARTICLE 3(1) OF THE BIT

A. Claimant's position

1. Legal standard

618. […]

2. Arbitrary measures

i. Extension of […]'s statutory monopoly over hybrid mail services

625. […]

ii. HAKOM's decision concerning […]'s value-added services

626. […]

iii. Declarations in support of […]

637. […]

iv. Separate cost accounting

641. […]

v. HAKOM's failure to investigate […] prices

645. […]

vi. The CCA Decisions

661. […]

The 2012 CCA Decision

662. […]

The 2015 CCA Decision

669. […]

Whether […]'s prices were predatory

681. […]

vii. Access to […] network

689. […]

viii. Public procurement of postal services

696. […]

ix. The compensation fund

701. […]

x. The failed acquisition of […]

709. […]

3. Breach of legitimate expectations

713. […]

4. Impairment by unreasonable or discriminatory measures

717. […]

B. Respondent's position

1. Legal standard

723. […]

2. Arbitrary measures

732. […]

i. Extension of […]'s statutory monopoly over hybrid mail services

733. […]

ii. HAKOM's decision concerning […]'s value-added services

734. […]

iii. Declarations in support of […]

744. […]

iv. Separate cost accounting

748. […]

v. HAKOM's failure to investigate […]'s prices

758. […]

vi. The CCA Decisions

774. […]

The 2012 CCA Decision

775. […]

The 2015 CCA Decision

783. […]

Whether […] prices were predatory

795. […]

vii. Access to […] network

801. […]

viii. Public procurement of postal services

808. […]

ix. The compensation fund

813. […]

x. The failed acquisition of […]

820. […]

3. Breach of legitimate expectations

824. […]

4. Impairment by unreasonable or discriminatory measures

829. […]

C. The Tribunal's analysis

835. Article 3(1) of the BIT provides:

> "Each Contracting Party shall ensure fair and equitable treatment of the investments of nationals of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those nationals. Each Contracting Party shall accord to such investments full physical security and protection."

836. The Parties do not dispute that the Fair and Equitable Treatment ("FET") standard is breached by conduct that is arbitrary, in bad faith, that fails to afford due process or to ensure appropriate levels of transparency. The Parties disagree however on whether conduct by a State needs to be outrageous or shocking for the State to be in breach of Article 3(1) of the Treaty.

837. The Tribunal aligns itself with a consistent line of jurisprudence finding that it is not necessary to make a showing of bad faith in order to conclude that the FET standard has been breached.[28] However, ultimately, any analysis under the FET standard will be heavily dependent on the facts of each case. The Tribunal would be reluctant to attempt to determine in the abstract whether a breach of the FET standard occurs when the conduct of a respondent State is objectionable or whether something more is required before a violation can be established. In any event, the Tribunal is not persuaded that it is empowered to make such a general determination.

838. The Parties agree and the Tribunal concurs, that arbitrary conduct falls foul of the FET standard. The Tribunal considers that the *Lemire v. Ukraine* Decision on Jurisdiction and Liability contains a useful overview of the notion of arbitrariness. Referring *inter alia* to *Lauder v. Czech Republic*,[29] *Tecmed v. Mexico*, *Loewen v. United States*,[30] *Saluka v. Czech Republic*, the *Lemire v. Ukraine* tribunal found that:

> "262. Arbitrariness has been described as 'founded on prejudice or preference rather than on reason or fact'; '… contrary to the law because … [it] shocks, or at least surprises, a sense of juridical propriety'; or 'wilful [sic] disregard of due process of law, an act which shocks, or at least surprises a sense of judicial propriety'; or conduct which 'manifestly violate[s] the requirements of consistency, transparency, even-handedness and non-discrimination'. Professor Schreuer has defined (and the Tribunal in EDF v. Romania has accepted) as 'arbitrary':

[28] *See*, Mondev v. United States, at 116; Bayindir v. Pakistan, at 181; Crystallex v. Venezuela, at 543.
[29] *Ronald S. Lauder v. The Czech Republic* (UNCITRAL), Final Award, 3 September 2001, at 221 (Exhibit RL-24) ("Lauder v. Czech Republic").
[30] Loewen v. United States, at 131.

> *'a. a measure that inflicts damage on the investor without serving any apparent legitimate purpose;*
> *b. a measure that is not based on legal standards but on discretion, prejudice or personal preference;*
> *c. a measure taken for reasons that are different from those put forward by the decision maker;*
> *d. a measure taken in wilful disregard of due process and proper procedure.'*
>
> 263. Summing up, the underlying notion of arbitrariness is that prejudice, preference or bias is substituted for the rule of law." [31] [internal citations omitted] [emphasis added]

839. The Tribunal subscribes to this view. A State's conduct will be arbitrary when the State acts capriciously, without a legitimate purpose, when it repudiates its own laws and regulations or when it shows preference or bias, as opposed to even-handedness.

840. Further, the Tribunal agrees with Claimant that the FET standard is infringed not only when a State engages in a positive act, but also when it fails to discharge its duties and to comply with its statutory obligations, when it fails to "to take reasonable precautionary and preventive actions"[32] to avoid damage to private property. Moreover, a breach can be established not only by means of a single act, but also by a series of acts or omissions which over time cumulatively result in a violation of the FET standard, even if each individual measure would not constitute by itself a breach.[33]

841. In the case before the Tribunal, Claimant argues that Article 3(1) of the Treaty has been breached by Respondent in multiple ways: (i) through arbitrary conduct; (ii) through the breach of Claimant's legitimate expectations; and (iii) through impairment by unreasonable or discriminatory measures. For each type of alleged violation, Claimant substantiates its claim by challenging conduct of Respondent's pertaining to several sets of facts:

(i) the alleged re-monopolization of hybrid mail services;
(ii) the treatment of value-added services;
(iii) the alleged preference accorded to […] during the drafting process of the 2012 PSA;
(iv) the alleged failure to implement separate cost accounting;
(v) the alleged failure by HAKOM to supervise […]'s prices and discounts;
(vi) the alleged failure by the CCA to sanction […]'s abuse of its dominant position on the postal services market;
(vii) the failed acquisition of […];

[31] Lemire v. Ukraine Decision on Jurisdiction and Liability, at 262, 263.
[32] Toto Costruzioni v. Lebanon, at 150.
[33] *See*, El Paso v. Argentina, at 518.

(viii) the alleged failure to ensure timely and non-discriminatory access to […]'s network;
(ix) the alleged exclusion from public tenders based on discriminatory grounds;
(x) HAKOM's double standard in exercising its regulatory powers;
(xi) the CCA's failure to take any measures in response to […]'s second complaint against […] for abuse of a dominant position in 2019; and
(xii) the alleged wrongful establishment of a compensation fund.

842. The Tribunal notes that not all of these claims, which were set out in the Memorial, were reiterated in the Reply, at the hearing or in Claimant's post-hearing submissions. In particular, Claimant's claim that the CCA failed to take any measures in response to […]'s second complaint against […] was not reiterated in the Reply or in subsequent argument before the Tribunal, presumably because prior to the filing of the Reply, the CCA rendered the 2015 CCA Decision. The Tribunal thus understands that this claim is now moot and Claimant's complaints with regard to the conduct of the CCA are subsumed in its claim that the CCA failed to sanction […]'s abuse of its dominant position. Further, Claimant did not reiterate in its Reply or in subsequent argument before the Tribunal its claim that HAKOM practiced a double standard in its regulatory supervision of […] and […]. The Tribunal thus understands that Claimant is no longer pursuing this argument as a separate claim for arbitrary conduct, but has instead integrated it in its general criticism of HAKOM's failure to supervise[…]'s prices and discounts. The argument appears to be maintained, however, in connection with Claimant's claim of impairment by arbitrary or unreasonable measures.

843. The Tribunal has taken note of Claimant's argument that Respondent showed a distinct preference for the national postal operator during the drafting of the 2012 PSA, by attempting to include a series of provisions meant to protect […] from competition. Claimant however acknowledges that these alleged attempts were ultimately unsuccessful. On this basis, the Tribunal is of the view that Claimant is not putting forth these allegations in order to attempt to substantiate a separate breach of the Treaty, but in order to demonstrate that the intent to protect the national postal company permeated and can ultimately help to explain Respondent's conduct at issue in this arbitration. The Tribunal will bear this in mind when addressing the substance of Claimant's claims.

844. The Tribunal also reiterates here that it has established at Section VI.C.4 above that Claimant's claim pertaining to hybrid mail services falls outside of its jurisdiction *ratione temporis*. Therefore, Claimant's allegations in this regard will only serve as background to the Tribunal's analysis.

845. As will be demonstrated in greater detail below, after careful consideration of the evidence before it and of the Parties' submissions, the Tribunal has reached the conclusion that Respondent has violated the FET standard through arbitrary conduct, which consisted of its repudiation of the *ex ante* regulatory framework that governed the provision of postal services and its attempt to re-monopolize a part of the postal services market in the first half of 2013 with a view to protecting the national postal operator. These actions and omissions reflect Respondent's outright repudiation of the *ex ante* regulatory framework governing the provision of postal services and constitute a breach of Article 3(1) of the Treaty.

846. Having reached this conclusion, the Tribunal does not consider it necessary to seek to establish further if this conduct also represented a violation of Claimant's legitimate expectations or resulted in an unreasonable or discriminatory impairment of Claimant's investment.[34] In the words of the *TECO v. Guatemala* tribunal:

> "A willful disregard of the law or an arbitrary application of the same by the regulator constitutes a breach of the minimum standard, with no need to resort to the doctrine of legitimate expectations."[35]

847. In the paragraphs below, the Tribunal will explain in more detail its findings with respect to each one of Claimant's allegations.

1. Whether Respondent failed to ensure that […] timely implemented separate cost accounting

848. After having examined the Parties' positions and the evidence in the record, the Tribunal finds that Respondent did not breach Article 3(1) of the Treaty by failing to ensure that […] timely implemented separate cost accounting.

849. At the outset, the Tribunal notes that, when investing in […], Claimant was aware that […] had not implemented separate cost accounting and that this was unlikely to be achieved in the following years. […] observed in his Report to […]:

> "Accounting separation
> 7.11 However, such compensation funding could only become possible if […] had separated its accounts between universal and non universal services, according to the

[34] The Tribunal will make, where appropriate, some observations with regard to Claimant's legitimate expectations or impairment claims.
[35] TECO v. Guatemala, at 621.

> requirements of Article 14 of the Postal Directive. My understanding is that this is unlikely to be achieved over the next few years."[36]

850. It is not disputed by the Parties that the implementation of separate cost accounting is a complex and time-consuming enterprise.[…], testified at the hearing that it took […] five years to implement separate cost accounting.[37][…], also acknowledged at the hearing that the introduction of separate cost accounting was a process that could take a number of years and was highly complex.[38]

851. The Tribunal notes that, in 2010 and 2011, HAKOM and […] had initiated a number of projects aiming at developing and implementing separate cost accounting, and were meeting regularly in order to coordinate their actions. At the hearing, […], testified that personnel from[…], HAKOM, […] and […] met every month or every two weeks in order to discuss and work on the project for separate cost accounting.[39] […] also testified that, as a result of these projects, by the end of the first quarter/beginning of the second quarter of 2012, […] was able to run the first calculations based on the […] model.[40] The Tribunal expresses no view on the reliability of these calculations, considering that they had not been verified by any independent auditor or by HAKOM. Nevertheless, what is evident from the record is that progress on the project for developing separate cost accounting was being made.

852. However, by 2012, the project had not been completed, as acknowledged both by HAKOM and[…]. For its part, HAKOM wrote in a letter to the Ministry of Transport dated 28 June 2012:

> "However, regardless of all conducted measures and procedures in connection with the so-called 'accounting unbundling and cost allocation', […] has not fully complied with its obligation. HAKOM believes that more significant improvements, i.e., compliance with the obligation, can hardly be expected without the use of sophisticated computer program solutions and the accompanying purchase of IT and other equipment, nor without the implementation of modern accounting methods and models."[41]

853. In September 2012, […] wrote to the CCA that:

> "It is true that the cost accounting system in […] has not yet been set up. However, its implementation had to be preceded by the adoption of secondary legislation (the adoption of which is not the responsibility of […] but the state), which was initiated during 2012.

[36] […] (Exhibit C-31).
[37] Tr., Day 3, 182: 5-25; 183: 1.
[38] Tr., Day 4, 21: 16-25; 22: 1-16.
[39] Tr., Day 5, 103:9-104:4.
[40] Tr., Day 5, 110: 10-25; 111: 1-11.
[41] […] (Exhibit C-69).

> During 2011 and 2012, […] worked intensively on meeting this particular legal obligation. The external adviser […] was engaged for this purpose and a contract was signed on 15 June 2011 for the provision of advisory services for the development and the implementation of the cost accounting model within a 20 month period. The realization of the contract is progressing as planned, and it is expected that the system will be established by 2013, while the full regulatory report is to be submitted to the relevant regulatory agency for 2012."[42]

854. The Tribunal observes that the project continued in 2013 and 2014. On 27 March 2013, HAKOM issued its Instructions on Accounting Separation.[43] This permitted […] to submit its first Regulatory Report to HAKOM on 29 August 2013.[44] Following a series of meetings between HAKOM and […] to discuss the first draft of the 2012 Regulatory Report, […] amended and resubmitted it on 30 October 2013.[45] HAKOM then engaged the services of […] in order to audit[…]'s amended Regulatory Report. In April 2014, […] found this report to be compliant with HAKOM's Instructions on Accounting Separation.[46] In August 2014, the UPU also informed […] that it approved the final report of the project for the development of its cost accounting model.[47]

855. On the basis of the above, the Tribunal finds that, while the implementation of separate cost accounting began considerably later than the deadline set by the 2009 PSA (or, for that matter, the 2003 PSA), nevertheless, by the time of Claimant's investment, both HAKOM and […] had set in motion the projects that were necessary for its completion. Because the development and implementation of separate cost accounting is highly complex, the finalization of the project took a number of years. However, the Tribunal has found nothing in the record to demonstrate that Respondent was not committed to the completion of the project.

856. For these reasons, the Tribunal concludes that Respondent did not breach Article 3(1) of the Treaty on account of failing to ensure that […] timely implemented separate cost accounting.

857. While no breach of the Treaty has been established, the fact remains that the separate cost accounting project was only completed in May 2014. The Tribunal, where appropriate, will take this fact into account when deciding other claims.

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[42] […] (Exhibit C-454).
[43] […] (Exhibit R-87); […] (Exhibit R-88).
[44] […] (Exhibit R-95).
[45] […] (Exhibit C-346); […] (Exhibit C-347).
[46] […] (Exhibit C-223); […] (Exhibit C-348).
[47] […] (Exhibit R-114).

2. Respondent's treatment of value-added services

858. After having considered the positions of both Parties and the evidence in the record, the Tribunal concludes that Respondent's treatment of value-added services was not arbitrary, but was reasoned, was applied consistently and uniformly on the market during the years when the 2009 PSA was in force. Respondent's conduct thus did not fall foul of the Treaty's Article 3(1). However, the Tribunal considers that Croatia's conduct was characterized by a lack of transparency and predictability, which resulted in a significant degree of confusion on the Croatian postal services market.

859. The Tribunal will explain its findings in more detail in the paragraphs below.

860. The Tribunal recalls that Article 10 of the 2009 PSA ("Other postal services and additional services") reads as follows:

> "(1) Other postal services shall be considered to be value added postal services and other postal services that are not universal postal services.
>
> (2) Value added postal services are the services which, along with the clearance, sorting, transport and delivery of items, comprise certain added value.
>
> (3) The added value referred to in paragraph 2 of this Article shall in particular comprise the following:
>
> 1. collection of the item at the request of the service user,
> 2. possibility to monitor the transport and delivery of a postal items over the Internet or in another appropriate way,
> 3. possibility of direct communication with the employee of the postal service provider for the purpose of giving additional instructions concerning the delivery of an item,
> 4. agreed time of delivery of an item,
> 5. the delivery of an item to the addressee after he signs for it.
>
> (4) Additional services are the services comprising a special manner of treatment during the clearance, sorting, transport and delivery of items in the provision of universal postal services, value added postal services and other postal services that are not universal postal services."

861. First, the Tribunal observes that Croatia's interpretation of Article 10(3) of the 2009 PSA on value-added services could well have been inconsistent with the *acquis communautaire* in the matter of postal services. This view has been expressed in no uncertain terms by the European Commission on a number of occasions in correspondence and during meetings

with representatives of Croatia.[48] In addition, it is apparent from the record that the Commission only understood the Ministry of Transport's interpretation of value-added services after HAKOM's decision of 18 May 2012 had already been rendered.[49]

862. In particular, […], a member of the working group tasked with the drafting of the 2009 PSA, testified as follows during the hearing with respect value-added services:

> "MS DAVIES: Do you remember who proposed the wording of that provision?
> […]: We had many discussions about it. We had, as a working group, many different views on that matter, and at the end of the story, when we were at the end of our time to finish that text, […] from Ministry [of Transport] made a final version of this Article and he explained how it should be treated".[50]

> "DR ALEXANDROV: What was, at that time, the position of […]?
> […] was head of the postal and telecommunication part of the Ministry. […]
> DR ALEXANDROV: He presented the draft of Article 10 to the working group? Did I understand you correctly?
> […]: He presented that Article to the working group, yes.
> DR ALEXANDROV: He explained, you said, how it worked.
> […]: Yes, he explained what that words [sic] should mean.
> DR ALEXANDROV: What was his explanation is my question.
> […]: His explanation was that all five of those value added services were obligatory to consider some service as a value added service, and that will be his or the Ministry's standing point if in some point in future will be dispute about that.
> We had many different opinions about it. We had so many discussions about that issue, and he said that he will handle this issue with HAKOM and with operators, and at the other hand, he will handle that with European Commission, <u>which we were very concerned that European Commission will not accept that kind of restriction</u>."[51] [emphasis added]

863. The Tribunal considers that […]'s testimony is corroborated by the rest of the evidence in the record and is credible. It is evident from the European Commission's correspondence with the Ministry of Transport in 2012 that the Ministry of Transport had not informed the European Commission of its intention to interpret value-added services cumulatively, despite its awareness that a restrictive interpretation ran the risk of not being accepted. In the 2 October 2012 meeting in Brussels between representatives of Croatia and of the European Commission, the latter made the following representation:

> "The European Commission emphasizes that it understands those are the provisions of the valid Act (even though such interpretation by the Croatian side was not earlier understood

[48] *See*, […] (Exhibit C-84); […] (Exhibit C-93); […] (Exhibit C-330); […] (Exhibit C-104).
[49] […] (Exhibit C-330).
[50] Tr., Day 3, 231: 11-19.
[51] Tr., Day 4, 88: 21-24; 89: 8-25; 90: 1-6.

> by the European Commission, so the EC did not react sooner), but it states that such interpretation of the provision is not in accordance with the acquis."[52]

864. Second, even though Croatia's interpretation of value-added services contravened the postal *acquis,* the Tribunal considers that this is only one of the factors in determining whether Respondent's conduct was arbitrary.

865. It is true that, at the time of the issuance of its interpretation of Article 10(3) of the 2009 PSA, Croatia was bound by an obligation to employ its best efforts in order to implement the *acquis communautaire* with respect to postal services. However, Croatia was not yet a member of the European Union and European Union law was not part of Croatian law. Therefore, Croatia remained at liberty to interpret national legislation in the manner it deemed fit, with the possible attendant consequence that an interpretation contrary to European Union law could affect its eventual accession to the European Union. This was explicitly acknowledged by the European Commission.[53]

866. While Respondent's interpretation of value-added services may not have been in line with the postal *acquis*, the Tribunal finds that it was consistent and applied equally to all operators on the market since the drafting of the 2009 PSA and until the entry into force of the 2012 PSA. This is sufficient to establish that Croatia's conduct was not arbitrary and was not in breach of Article 3(1) of the Treaty.

867. As shown above, […] clarified that the Ministry of Transport's interpretation of value-added services was, from the very beginning, cumulative. After the entry into force of the 2009 PSA, HAKOM and the Ministry of Transport issued several interpretive notes to a number of postal operators, clarifying that Article 10(3) of the 2009 PSA should be read as requiring the provision of all five services listed therein. This is how, on 10 March 2010, HAKOM responded to a request for interpretation from the postal operator[…].[54] On 1 March 2011, the Ministry of Transport clarified to HAKOM that Article 10(3) of the 2009 PSA required the effective provision of all five listed services, not simply the availability of all the services.[55] On 9 May 2011, the Ministry of Transport responded to an inquiry from […] in this matter, again providing the same interpretation.[56]

868. Third, the Tribunal finds that Croatia's interpretation of Article 10(3) of the 2009 PSA – while consistent – was not completely clear to the operators on the market. To the contrary,

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[52] […] (Exhibit C-330).
[53] *Id.*; […] (Exhibit C-28).
[54] […] (Exhibit R-176).
[55] […] (Exhibit C-331); […] (Exhibit R-37).
[56] […] (Exhibit C-332); […] (Exhibit R-38).

prior to Claimant's investment in[…], there was considerable regulatory uncertainty with respect to the correct interpretation of value-added services.

869. In this respect, the Tribunal finds that the record does not support a conclusion that the interpretations issued by HAKOM or the Ministry of Transport had been made public in any way. To the contrary, […]'s inquiry with the Ministry of Transport in May 2011, more than a year after HAKOM's first interpretive letter, demonstrates that the postal services providers had not been offered any official guidance on this matter.

870. […] was one of the operators that were uncertain as to the correct interpretation of value-added services under Croatian law. During the hearing, […], declared:

> "MR PORTWOOD: You had a concern at the time that Article 10 might be interpreted as requiring all five value added services to be provided cumulatively.
> […]: That is correct."[57]

871. The Tribunal observes that, due to its concerns with respect to the interpretation of the 2009 PSA, an instrument of Croatian law, […] elected to seek the opinion of the European Commission on the meaning of value-added services. The Tribunal does not find anything inherently wrong with[…]'s choice to obtain the views of the European Commission on this matter. In light of Croatia's impending accession to the European Union, it was prudent of […] to obtain an interpretation of the *acquis communautaire* from the Commission. However, […] did not endeavor to also obtain the opinion of any Croatian public authority. When questioned about this choice during the hearing, […] testified:

> "MR PORTWOOD: If you did not have a problem over the definition of the value added services in Article 10 of the Postal Services Act of 2009, why were you writing to the European Commission for their view?
> […]: Our enquiry for the other interpretation, or our enquiry towards the European Commission came about through my colleague[…], he had joined our company, and he actually proposed that the letter would have a certain weight since Croatia is nearing entry into the European Union and, on the other hand, such an opinion would provide a certain, let us say, certainty for us who are here in the market. We did not know which way the answer would go but our decision was made due to the reasons I just stated."[58]

> "MR PORTWOOD: Having got this letter, you decided to do nothing with respect to the Croatian authorities, did you?
> […]: Yes.
> MR PORTWOOD: You did not show them this letter?
> […]: No, we did not.
> MR PORTWOOD: You did not ask them for their interpretation of Article 10?

[57] Tr., Day 2, 282: 12-16.
[58] Tr., Day 2, 273: 1-18.

> […]: No, we never asked HAKOM to interpret Article 10.
> MR PORTWOOD: Neither the Ministry of Transport?
> […]: No, neither the Ministry of Transport."[59]

872. Respondent contends that […]'s inquiry with the European Commission, instead of the Ministry of Transport, was prompted by its awareness that the Ministry would interpret value-added services to its detriment. Respondent notes that the inquiry with the European Commission had been made pursuant to advice from […], who had joined […] in September 2010.[60]

873. The Tribunal finds that, even if Respondent's contention that […] had knowledge of the Ministry of Transport's cumulative interpretation of Article 10(3) of the 2009 PSA were true, […] would not have been wrong to assume that, in light of Croatia's impending accession to the European Union, the Ministry of Transport may change its stance when confronted with the express disapproval from the European Commission. Or, in other words, as […] testified during the hearing, to assume that the letter from the European Commission would act as "kind of an insurance for […]".[61]

874. The uncertainty on the Croatian postal services market with respect to the correct interpretation of value-added services was also expressly recorded in the […], which was provided to […] before the acquisition of […]:

> "6.2 The current situation is that (universal service) letters weighing below 50g are reserved to[…]. However, value added items are not reserved.
>
> 6.3 […] has claimed that its letter services are value added and as such are legal under current arrangements.
>
> 6.4 However, there remains some legal ambiguity about what constitutes value added services and it could be argued that this has deterred some possible clients from switching to […].
>
> 6.5 Further, this legal ambiguity has placed the company at some disadvantage in its relationship with the regulatory authorities and with […]. It can be argued that the company has tended to 'keep a low profile' in order to avoid legal or regulatory difficulties.
>
> 6.6 This may have prevented it from pursuing both a more aggressive sales strategy and from seeking some form of legal solution to other issues such as obtaining access to[…]'s facilities."[62]

[59] Tr., Day 2, 283: 1-15.
[60] […] (Exhibit R-35).
[61] Tr., Day 2, 273: 15, 16.
[62] […] (Exhibit C-31).

875. Bancroft's Investment Memo also noted that […]'s services were value-added but that there was a risk that they could be classified by the regulator as universal services. However, […]'s Investment Memo explicitly mentioned that, based on the letter from the European Commission, it considered[…]'s services to be value-added:

> "[…] requested interpretation from the EU authorities of what is universal postal services. Based on the criteria provided by the European Commission the company provides only value added services, which are permitted under the regulation."[63]

876. Respondent argues that, based on the conclusions of the […] and of the Investment Memo, Claimant should have been aware of the risk that […]'s operations could be found non-compliant with the 2009 PSA. The Tribunal does not share Respondent's view. At the time of Claimant's investment, neither HAKOM, nor the Ministry of Transport had issued any public official interpretation of Article 10(3) of the 2009 PSA. In addition, the European Commission had expressly stated that, for purposes of European Union law, it was sufficient if a value-added postal service included only one additional added value. Importantly, at the time of Claimant's investment, Croatia was under an obligation to incorporate the *acquis communautaire* into its internal law.

877. […], confirmed that, before investing in […], […] had relied upon the express views of the European Commission, on HAKOM's lack of interference with […]'s operations and on the legal due diligence provided by […]. On these bases, […] concluded that […] was providing its services in compliance with the law:

> "The postal market expert that […] retained for the commercial due diligence on […] pointed out that there was a 'lack of detailed regulatory supervision of the [Croatian postal] sector' and that […] had 'been able to build its network during a time of considerable regulatory uncertainty'. At the time, we did not think that the 'lack of detailed regulatory supervision' would unfairly affect […]. The expert also pointed out that there was 'legal ambiguity about what constitutes value added services' in Croatia and that '[i]t can be argued that the company has tended to 'keep a low profile' in order to avoid legal or regulatory difficulties.' Bancroft discussed this with […]'s management, who assured us that […] had at all times complied with the Croatian postal regulation. Management also showed […] a letter in which the European Commission confirmed […]'s understanding of the relevant provisions of the Croatian postal legislation." [internal citations omitted] [emphasis added][64]
>
> "MR PORTWOOD: How do you know what […] was doing with the full knowledge of HAKOM?

[63] […] (Exhibit C-33).
[64] […] Witness Statement, at 19.

> […]: Well, […] had registered, I think it was in the spring of 2010, to provide other postal services and every year […] paid a fee to HAKOM with respect to the provision of those services but it was certainly within the knowledge of HAKOM what […] was doing.
> […]
> MR PORTWOOD: Do you know whether HAKOM every time a company registered did a review of what this company was actually doing?
> […]: Well, no, but take a reasonable approach to this. […] had 20 per cent of the market share. […] was the only principal competitor to […].[…] was delivering 60 million letters a year, 5 million plus per month. HAKOM knew what […] was doing and –
> MR PORTWOOD: How do you know that HAKOM knew?
> […]: Well, as I said, it stands to reason that HAKOM would know what the number 2 competitor in the market is doing."[65]

> "MR PORTWOOD: But you did not do any investigation yourself of what actually was happening in Croatia by[…], did you?
> […]: Well, that is a bit exaggerated. We did hire a law firm, […], to conduct due diligence before we did the transaction. […] did an extensive chapter on the regulatory environment in Croatia and on[…]'s position in that environment and Wolf Theiss found that there was no issue, no problem, with[…]'s provision of postal services.
> […]
> MR PORTWOOD: Did they do that? Did they actually say, 'Yes, we have investigated what […] is doing and it is legal'?
> […]: Yes. That is, it was not in the form of an opinion, it was, as I said, a due diligence memo which is typical in our industry that you request from a law firm to identify any legal issues or problems that the investor should be aware of. They found that there was no regulatory issue with regard to […] in the provision of postal services."[66]

878. […] also testified at the hearing that, in particular, the European Commission's interpretation of value-added services carried significant weight with […]:

> "MR PORTWOOD: When you read this, this did not concern you, that you were, in fact, asking someone had [sic] no authority to interpret Croatian law to do so?
> […]: No, it rather gave us comfort, and the reason it gave us comfort is because we had invested over the years as […] in a variety of regulated sectors in Hungary and in Romania and in Estonia, and we were aware from those experiences that when the country in question was in the queue to become part of the EU, as part of the acquis, the country in question would commit to do its best to align its regulations with those of the EU, and that is a commitment that Croatia made.
> We had made, as I said, two or three similar investments in previous years and we expected and relied upon Croatia to do this prior to accession to the EU.
> So the fact that there was an EU/an EC statement about added value services that coincided with the […] position, we thought that was important because we expected Croatia to honour that commitment."[67]

[65] Tr., Day 2, 42: 12-19, 24, 25; 43: 1-12.
[66] Tr., Day 2, 44: 6-16; 45: 15-25.
[67] Tr., Day 2, 56: 10-25; 57: 1-8.

879. On the basis of the above, the Tribunal cannot accept Respondent's contention that […] and/or Claimant had assumed the risk that […]'s operations were illegal under Croatian law. The record supports the conclusion that Claimant invested in […] at a time of regulatory uncertainty but in the genuine belief that its operations complied with both Croatian and European Union law.

880. Fourth, the Tribunal cannot agree with Respondent's contention that […]'s operations were illegal or that […] did not provide any one of the five listed services in Article 10(3) of the 2009 PSA.

881. As mentioned earlier, before HAKOM's decision of 18 May 2012, neither HAKOM nor the Ministry of Transport had issued any public official interpretation of Article 10(3) of the 2009 PSA. While […] did not request an official interpretation from these two authorities, it did obtain an official answer from the European Commission clarifying the meaning of value-added postal services under European Union law. As reflected in the correspondence from the European Commission to the Ministry of Transport and HAKOM in the second half of 2012, Croatia's interpretation of value-added services appeared to contravene the postal *acquis* at a time when its incorporation into national law was incumbent upon it. Moreover, even though […] registered with HAKOM for the provision of value-added services in April 2010, it was only in July 2011 that HAKOM initiated an expert supervision of […] seeking to verify the regularity of its operations.

882. The Tribunal finds that […]'s inaccurate understanding of the meaning of value-added postal services under Croatian law is not the result of any fraudulent intent to abscond from the postal regulator, as implied by Respondent, but of a genuine belief that Croatian law and European Union law on this issue were aligned. It is also, in part, the necessary consequence of Croatia's own failure to publicly clarify the meaning of value-added services and of its refusal to incorporate the postal *acquis* into national law. In other words, while Respondent's treatment of value-added services was consistent and applied equally on the market, and while Croatia could refuse to incorporate the entirety of the postal *acquis* before its accession to the European Union,[68] Respondent's failure to ensure full transparency and clarity on the market necessarily invalidates the conclusion that […]'s operations could be deemed illegal under the Treaty.

883. Further, the Tribunal finds that the record does not support Respondent's argument that […] did not in fact provide any one of the five services listed in Article 10(3) of the 2009 PSA. The minutes of HAKOM's inspection of […] in November 2011 clearly show that

[68] As mentioned earlier, the Tribunal draws this conclusion from the perspective of the Treaty, not from the perspective of European Union law.

HAKOM reviewed […]'s contracts and made inquiries with respect to the manner in which […] provided services to its customers.[69] HAKOM's inspection of […] was intended to verify precisely if […] was providing value-added postal services in compliance with the 2009 PSA. However, HAKOM's 18 May 2012 decision, issued at the conclusion of this inspection, only found that […] was not collecting signature upon delivery. […], the supervisor from HAKOM in charge of the inspection, confirmed at the hearing that […] was providing the remaining four services listed in Article 10(3) of the 2009 PSA:

> "MS DAVIES: So you found that […] was not providing signature on delivery for every letter that it was delivering, correct?
> […]: Yes.
> MS DAVIES: That was the fifth added value under Article 10(3).
> […]: That is correct, yes.
> MS DAVIES: In that decision, […], did you find that […] was not collecting postal items at the request of the sender?
> […]: No, I only found that the fifth one is missing from the paragraph – from the item 3 of Article 10.
> MS DAVIES: Right, so having done your supervision, questioned management, reviewed documents, asked for additional information, you found that the only missing service was the signature on delivery, did you not?
> […]: That is correct."[70]

884. Fifth, the Tribunal finds that the HAKOM Council's refusal to address the European Commission's letter in its decision dismissing […]'s appeal or to otherwise refer to EU law was not arbitrary. The Tribunal reiterates that, not being a member of the European Union in 2012, it was Croatia's prerogative to decide how to interpret national legislation. The HAKOM Council explained that its refusal was based on the European Commission's acknowledgement that its letter did not represent an authentic interpretation of European Union law and that Croatia could freely interpret its own laws:

> "[…] HAKOM points out that the letter submitted by the European Commission to the Appellant clearly states that it does not represent 'the opinion of the College of Commissioners nor the interpretative evaluation of the provisions of said Postal Directive, nor the authentic and final interpretation of the Union law, which is a prerogative of the European Court of Justice (the EU court)'. In light of all the above mentioned, it is evident that the statements made in the letter cannot be considered in this procedure in order to assess the admissibility of the interpretation of the provision of Article 10, paragraph 3 of the PSA in light of the EU acquis. This has been confirmed by the European Commission in its explanation provided in the stated letter of the "interpretation of the national postal service legislation as an exclusive responsibility of national authorities" of EU country members."[71] [emphasis added]

[69] […] (Exhibit C-43).
[70] Tr., Day 6, 54: 4-22.
[71] […] (Exhibit C-78).

885. It is true that HAKOM did not refer to other sources of European Union law, such as judgments of the CJEU, in order to assess whether the Ministry of Transport's interpretation complied with the postal *acquis*. However, that is not dispositive of the Tribunal's analysis, which is made on the basis of the Treaty and international law, not European Union law. What matters, for purposes of international law, is that the HAKOM's Council decision, including its refusal to follow the European Commission's views, was reasoned.

886. The Tribunal notes that, when the European Commission requested both HAKOM and the Ministry of Transport to reconsider their interpretation of value-added services, arguing that it was contrary to the Postal Directives and unjustifiably restrictive,[72] Respondent refused to do so. However, again, its refusal was reasoned. In the Ministry of Transport's letter to the European Commission dated 14 September 2012, Respondent explained that its interpretation of value-added services was intended to "preven[t] the illegal provision of services, which [were] the subject of the exclusive rights of the public operator (reserved universal postal services), by other postal services providers, i.e. for the purpose of retaining the universal postal services by the only legally determined mandatory universal postal services provider in the Republic of Croatia under the Act" and to ensure "a higher level of service quality".[73]

887. Further, Croatia did not select this interpretation irrationally. In its letter to the European Commission, the Ministry of Transport explained that it intended to protect the provision of the universal service and to ensure higher levels of quality in postal services. While Claimant may disagree with the justification of these concerns, the Tribunal finds that they were legitimate. The universal postal service was a service of public interest. In addition, considering that the postal services market was not fully liberalized in 2012, Respondent could decide to what degree it opened the market to private operators. Consequently, the Tribunal does not find that Croatia's insistence on a cumulative interpretation of Article 10(3), as it had done on a number of previous occasions, was arbitrary.

888. In conclusion, the Tribunal finds that Respondent's treatment of value-added services under the 2009 PSA was reasoned, was applied consistently and uniformly on the market, albeit with some deficiencies with regard to transparency. On this basis, the Tribunal concludes that, while Croatia could have definitely handled the matter in a more satisfactory way, Respondent's conduct was not arbitrary. Further, because Croatia could interpret its national legislation as it deemed fit and was only held to fully implement the

[72] […] (Exhibit C-84).
[73] […] (Exhibit C-98).

acquis communautaire as of the date of accession to the European Union – facts acknowledged by the European Commission on several occasions – Croatia's conduct could not have been in breach of any legitimate expectations held by Claimant, even if the Tribunal were to endorse its understanding of this concept. Finally, and for the same reasons, Croatia's conduct with respect to value-added services cannot be deemed to have impaired Claimant's investment by unreasonable or discriminatory measures.

3. Whether HAKOM abdicated its regulatory mission to supervise […]'s prices and discounts

889. At the outset, the Tribunal recalls that its task under the Treaty is not to sit in appeal against decisions taken by regulatory agencies at the State level. Equally, the Tribunal is not empowered to sanction purported non-compliance with national law:

> "The international tribunal's sole duty is to consider whether there has been a treaty violation. A claim that a regulatory decision is materially wrong will not suffice. It must be proven that the State organ acted in an arbitrary or capricious way."[74]

890. The Tribunal also bears in mind that, due to the fact that a national postal regulator is made up of experts with intimate knowledge of underlying data, it is best placed to assess whether the prescriptions of the postal legislation and attendant regulations have been complied with. It is not the task of this Tribunal to substitute its judgment for that of a national regulatory authority.

891. The Tribunal, after having examined the facts of this case, concludes nevertheless that this is not a case where the regulator attempted in good faith but ultimately failed, to discharge its duties. This is a case where the regulator completely abdicated its duties: HAKOM utterly failed to regulate […]'s prices and discounts and ignored repeated complaints from […] alleging serious violations of the postal law. The Tribunal considers that HAKOM's conduct can only be explained by a desire to protect […] from competition either before, or after the liberalization of the postal services market. No deference is due when a national regulatory authority manifestly refuses to fulfill its obligations. For these reasons, which will be developed in greater detail in the paragraphs below, the Tribunal finds HAKOM's conduct was arbitrary and in violation of Article 3(1) of the Treaty.

892. There is considerable debate between the Parties with regard to the precise contours of HAKOM's powers as regulator of the postal services market. The Tribunal considers that a comprehensive analysis of HAKOM's role is not necessary as this case does not turn on

[74] Lemire v. Ukraine Decision on Jurisdiction and Liability, at 283.

the minutiae of HAKOM's regulatory powers. This is a case where the regulator of the postal services market utterly failed to fulfill its statutory duties.

893. Nevertheless, for more clarity, the Tribunal will address below the question of HAKOM's regulatory powers under both the 2009 and the 2012 PSAs with respect to the prices of postal services.

894. The Tribunal recalls that Article 32 of the 2009 PSA ("General Principles") provides:

> "(1) Prices of postal services shall be charged pursuant to the price list of postal services.
>
> (2) The postal service provider shall submit the price list of postal services to the Agency at least 15 days before its application.
>
> (3) The postal service provider shall make publicly available a clearly understandable price list of postal services, and shall put an excerpt from the price list on a visible place in the premises intended for the users of postal services, and shall make the price list available at the request of the user.
>
> (4) Prices of postal services:
>
> 1. shall not comprise additional amounts that the postal service provider would determine solely on the basis of this significant market power on the postal services market,
> 2. shall not be determined below the unit cost with the intention of taking or maintaining the significant market power on the postal services market,
> 3. shall not be discriminatory.
>
> (5) More specific stipulations on the manner and terms of payment shall be set out in the general conditions of the postal service provider." [emphasis added]

895. Article 33 of the 2009 PSA ("Prices of universal postal services") provides:

> "(1) The prices of universal postal services shall be:
>
> 1. equal for equivalent services for items of correspondence for all users in the entire area where the postal service provider provides universal postal services,
> 2. affordable, cost-oriented and stimulating for the efficient provision of universal postal services,
> 3. determined so as not to give preference to some users over other users of equivalent services who deposit items under similar conditions.
>
> (2) The provision of paragraph 1 of this Article shall not exclude the right of the universal postal service provider to grant discounts to users who send a larger number of items, provided that such discount is envisaged in the price list of postal services and applies in the equal manner to all users sending items under similar conditions.

> (3) The Agency may pass a decision entirely or in part amending or revoking the prices of universal postal services, prior to or after their publication, if it establishes that they are contrary to the provisions of this Act.
>
> (4) The Agency shall approve the prices of reserved services referred to in Article 9, paragraph 1 of this Act at the proposal of the public operator, which must contain the calculation formula for the cost of each service respectively.
>
> (5) The Agency shall decide on the proposal of prices referred to in paragraph 4 of this Article within 30 days of having received the proposal concerned." [emphasis added]

896. Article 45 of the 2012 PSA ("General Principles") reads:

> "(1) Prices of postal services shall be charged pursuant to the tariffs of postal services.
>
> (2) The postal service provider shall submit the tariffs for postal services to the Agency at least 15 days before its application.
>
> (3) The postal service provider shall be obliged to publish clear and valid postal services tariffs, and shall put an excerpt from the tariffs in a visible place at the premises intended for the users of postal services, and shall make the tariffs available at the user's request.
>
> (4) Prices of postal services may not:
> 1. comprise additional amounts that the postal service provider would determine solely on the basis of his significant market power on the postal services market,
> 2. be determined below the unit cost with the intention of taking or maintaining significant market power on the postal services market.
>
> (5) The manner and terms of payment shall be set out in the general terms and conditions of the postal service provider." [emphasis added]

897. Article 46 of the 2012 PSA ("Prices of universal services") provides:

> "(1) The prices of the universal postal service shall be:
> 1. identical for identical services for items of correspondence for all users in the entire territory of the Republic of Croatia,
> 2. affordable, cost-oriented and stimulating for the efficient provision of universal postal services,
> 3. non-discriminatory and transparent.
>
> (2) The provision of paragraph 1 of this Article shall not exclude the right of the universal postal service provider to grant discounts to users who send a larger number of items, provided that such discount is envisaged in the tariffs for universal services and applied in the equal manner to all users sending postal items under similar circumstances.
>
> (3) The discounts referred to in paragraph 2 of this Article shall not influence the increase of net costs referred to in Article 50 of this Act.

> (4) When the universal service provider, pursuant to Agreement in Article 16 Paragraph 2 of this Act, applies special prices, it must respect the rules of transparency and non-discrimination regarding prices and related terms and conditions.
>
> (5) The Agency may pass a decision entirely or in part amending or revoking the prices of universal service, before or after their publication, if it establishes that they are contrary to the provisions of this Act." [emphasis added]

898. With a few exceptions, the principles established by the 2009 and 2012 PSAs with respect to the prices of postal services are the same. For purposes of the Tribunal's analysis, the relevant principles are:

(i) Prices of postal services are charged pursuant to the price list of the postal service provider (Article 32(1) of the 2009 PSA and Article 45(1) of the 2012 PSA);
(ii) Postal service providers must submit their price lists to HAKOM at least 15 days before their application (Article 32(2) of the 2009 PSA and Article 45(2) of the 2012 PSA);
(iii) Prices of postal services may not be determined below unit cost with the intention of taking or maintaining significant market power on the postal services market (Article 32(4).2 of the 2009 PSA and Article 45(4).2 of the 2012 PSA);
(iv) Prices of universal postal services must be identical for identical services (Article 33(1).1 of the 2009 PSA and Article 46(1).1 of the 2012 PSA);
(v) Prices of universal postal services must be cost-oriented (Article 33(1).2 of the 2009 PSA and Article 46(1).2 of the 2012 PSA);
(vi) Prices of universal postal services must be non-discriminatory (Article 33(1).3 of the 2009 PSA and Article 46(1).3 of the 2012 PSA);
(vii) The principles set out at points (iv) through (vi) do not prevent the universal postal service provider from offering discounts to large volume users, provided that the discounts are envisaged in the price list and are non-discriminatory (Article 33(2) of the 2009 PSA and Article 46(2) of the 2012 PSA);
(viii) HAKOM is empowered to pass a decision amending (entirely or in part) or revoking the prices of universal services, before or after their publication, if it establishes that they are contrary to the applicable PSA (Article 33(3) of the 2009 PSA and Article 46(5) of the 2012 PSA).

899. Under the 2009 PSA, which predated the liberalization of the postal services market, HAKOM had the following additional powers with respect to the prices of reserved services:

(i) HAKOM approved the prices of reserved services at the proposal of the public operator, which proposal was required to contain the calculation formula for the cost of each service (Article 33(4) of the 2009 PSA);

(ii) HAKOM decided on the public operators' proposal for the prices of reserved services within 30 days from the day of receipt of the proposal (Article 33(5) of the 2009 PSA).

900. The Parties dispute whether HAKOM was empowered under both the 2009 and the 2012 PSAs to approve the discounts offered by the universal postal service provider. The Tribunal does not consider that the question of HAKOM's possible authority to approve discounts before their application is dispositive. What is dispositive is whether HAKOM had the authority to regulate the universal service provider's discounts and, to this question, both Parties' answers are in the affirmative. Both Parties accept that HAKOM could amend (entirely or in part) or revoke the prices of universal postal services, including the discounts, if it determined that they were contrary to the provisions of the postal law.

901. The Tribunal considers that this necessarily includes the situation in which […]'s discounted prices were found to be in breach of the PSAs' prohibition against below-cost pricing.

902. The Tribunal observes that Respondent seeks to limit the scope of HAKOM's power to amend or revoke […]'s prices or discounts to a verification pertaining to the universal service provider's net cost. The Tribunal considers that this interpretation is not supported by the express provisions of the 2009 and 2012 PSAs, both of which refer to the "provisions of this Act" [emphasis added] and not just to the provision regarding the net cost calculation.

903. In addition, the Tribunal finds that the evidence in the record similarly supports the conclusion that HAKOM could amend or revoke, and thus regulate, […]'s discounts, if it found that they were contrary to the postal law. […], admitted as much at the hearing:

> "MS DAVIES: In the 15-day period between when the provider submits the price list and when the price list applies, what does the Postal Services Department do, […]?
> […]: They confirmed that the price is in accordance with the law, with the provisions of the law."[75]

> "MS DAVIES: So you are telling us, […], that […]'s discounts were not at all, regulated by HAKOM?
> […]
> […]: Yes. As I said, HAKOM regulated prices, not discounts.

[75] Tr., Day 6, 58: 9-15.

> THE PRESIDENT: Discounts is part of prices.
> […]: I said a moment ago that we considered discounts only in the context of whether or not the provider of universal services is going below the unit cost so that they would not then apply to the State for an unwarranted net cost, which they had the right to do from the law in 2009.
> We only looked for prices – and the discounts – that they cost-oriented [sic], meaning that the discounts do not go below the unit cost price only economists in HAKOM did this [sic].
> MS DAVIES: So, […], you would have to check whether the discounted prices, the prices with the discounts, were below the unit cost, would you not?
> […]: Yes, that is what I said.
> MS DAVIES: If the discounted prices were below the unit cost then HAKOM, as the regulator, would have the authority to amend or revoke those discounted prices. Is that not right?
> […]: Yes, that is correct but the price was not confirmed. None of the economists alerted me that the price was below the cost, unit cost."[76] [emphasis added]

904. The Tribunal considers that HAKOM's authority to amend or revoke […]'s discounts is also evident from the documentary evidence in the record. When, on 21 June 2012, […] informed HAKOM that its price list of 18 May 2012 contained an "unintentional" error and that discounts of 7% should be read as discounts of "at least 7%",[77] HAKOM met with […] in order to discuss its discounts. Following this meeting, HAKOM requested from […] "an explanation and more detailed elaboration of the questionable rebate class in order to establish the amount of rebate in a transparent way and in relation to the quantity of mails (letters) over 10,000,001 per annum or legality of the submitted Pricelist".[78] In other words, according to HAKOM's own words, the elaboration of […]'s discounts was necessary not only in order to ensure transparency, but also the "legality of the submitted Pricelist". The Tribunal finds that HAKOM's choice of words demonstrates that the regulator understood perfectly well that it was under a legal duty to verify if […]'s discounts brought its prices below unit cost. This was undoubtedly understood by […] too, considering that, in its 6 September 2012 letter to HAKOM, […] purported to demonstrate that its discounts did not bring its prices below the unit cost.[79]

905. […] also testified at the hearing that HAKOM needed to know the extent of […]'s discounts, and not just to ensure that the discounts were transparent and non-discriminatory:

> "MS DAVIES: HAKOM reacted to this letter by calling for a meeting with […]'s representatives; is that not right?
> […]: Yes, that is correct. The HAKOM Council and the Management Board of […] met.

[76] Tr., Day 6, 63: 1-3, 9-25; 64: 1-12.
[77] […] (Exhibit R-54).
[78] […] (Exhibit R-58).
[79] […] (Exhibit R-65).

> MS DAVIES: That was because HAKOM knew that […] was not describing its prices and discounts in a transparent manner, is it not?
> […]: Not in that manner but the discount needed to be determinable, so to say. We need to know exactly how much it is. We need to know how far the discounts can go. This means only starting at 7 per cent.
> […]
> MS DAVIES: But you also needed that information in order to assess whether […]'s discounts were cost-oriented or below the unit cost, did you not?
> […]: The discounts could not go – could not be less than the cost.
> MS DAVIES: In order to determine whether the discounted prices were below the cost you needed first to determine the maximum discounts?
> […]: I suppose so, yes."[80] [emphasis added]
>
> "MS DAVIES: If […]'s management takes a decision to grant discounts, those discounts are subject to review by HAKOM: yes or no?
> […]: Yes."[81] [emphasis added]

906. The Tribunal therefore finds that both the 2009 PSA and the 2012 PSA required HAKOM to amend or revoke […]'s prices and discounts if they were found to be contrary to the provisions of the law, including as a result of the fact that […]'s discounts brought its prices below unit cost.

907. The Parties disagree on the type of analysis that HAKOM was required to undertake in order to make such a determination. Claimant argues that HAKOM would have needed […]'s detailed cost information and that this only became available once […] implemented separate cost accounting, on 9 May 2014. Claimant adds that, on the basis of […]'s cost data, HAKOM would have been required to perform a bottom-up cost analysis. Respondent disputes that HAKOM was obligated to perform a bottom-up cost analysis and adds that HAKOM was sufficiently acquainted with […]'s ABC model in 2012 in order to be confident that […]'s prices were not inferior to its costs.

908. It is not the task of this Tribunal to identify the calculations that HAKOM would have needed to run in order to verify if […]'s discounts brought its prices below unit cost. What is important is that both the 2009 and the 2012 PSAs obligated HAKOM to make such verifications. It was therefore incumbent upon HAKOM to develop the necessary regulatory tools that would have allowed it to comply with its statutory obligations. In addition, the Tribunal notes that, while the 2009 and 2012 PSAs did not specify how HAKOM could verify if […]'s prices were below unit cost, they did impose other obligations that, if complied with, would have assisted HAKOM in the performance of its tasks. Under Article 33(4) of the 2009 PSA, […] was required to substantiate its proposal

[80] Tr., Day 6, 83: 15-25; 84: 1, 2, 23-25; 85: 1-8.
[81] Tr., Day 6, 117: 15-18.

for the price of reserved services with "the calculation formula for the cost of each service respectively". Presumably, on the basis of this formula, HAKOM could have at least ascertained whether […]'s discounts on the price of its reserved services brought its prices below unit cost. However, as will be further elaborated upon below, in 2012, […] did not provide such calculation formula. In addition, under both the 2009 and the 2012 PSAs, […] was obligated to apply the principles of cost accounting separation. Again, as demonstrated at Section VII.C.1 above, […]'s cost accounting separation project had not been completed in 2012. While […] could generate some data on the basis of the system that it had implemented by 2012, the evidence in the record demonstrates that the system was not yet fully functional and had not been verified. In other words, at that point in time, […]'s calculations based on the incipient stage of its ABC model could not be verified.

909. More importantly, the Tribunal considers that this debate is more academic than practical. As will be developed in more detail below, the Tribunal has found that HAKOM did not perform any verification with respect to […]'s discounts in 2012 or 2013. In addition, in 2012, HAKOM failed almost catastrophically to comply with any one of its regulatory duties concerning the prices of postal services.

910. *First*, the Tribunal finds that HAKOM failed to exert any control in both 2012 and 2013 over the amendment and publication of […]'s price lists. The lack of any regulatory oversight on this matter permitted […] to modify or backdate its price lists to suit its needs without fear of any legal repercussion.

911. As noted above, both the 2009 and the 2012 PSAs mandated that postal services providers submit their price lists to HAKOM at least 15 days prior to their entry into force. […] complied with this obligation on 18 May 2012, when it notified to HAKOM the price list that would be published on 5 June of that year. However, when […] purported to amend that price list so as to include discounts of "at least 7%", […] no longer waited the required fifteen days and published the amended price list on the very same day, on 21 June 2012. In spite of its voiced reticence as to the legality of the discount category of "at least 7%", HAKOM did not object to the unauthorized publication and amendment of […]'s price list. When […] complained about HAKOM's inaction faced with […]'s attempt to thus legalize its predatory discounts,[82] HAKOM failed to react. On 4 September 2012, before notifying HAKOM or providing the requested explanation of its discount category that included rebates of "at least 7%", […] published a new price list, backdated to 5 June 2012 and which introduced discounts of 40%-55%.[83] […] changed the date of the price list on 10

[82] […] (Exhibit C-90).
[83] […] (Exhibit C-96).

> September 2012.[84] When, on 17 September 2012, […] again complained to HAKOM about these unauthorized changes to […]'s price lists,[85] HAKOM failed to react. In December 2012, […] published another price list, valid from 1 January 2013.[86] However, […] only notified it to HAKOM on 18 January 2013.[87] When […] complained about the "falsification" of […]'s price list,[88] HAKOM again left this grievance go unanswered.[89]

912. *Second*, the Tribunal finds that HAKOM failed to ensure that […]'s 2012 price lists were accompanied by "the calculation formula for the cost of each service", as mandated under Article 33(4) of the 2009 PSA. […]'s price list of 18 May 2012 did not include any attachment setting out the calculations that substantiated the proposed discounts. […]'s letter to HAKOM dated 6 September 2012, offering explanations with respect to […]'s discount category of "at least 7%", only purported to explain the cost of one activity out of a total of 433 and to calculate the real cost of delivering a small letter in Zagreb.[90] However, […]'s 10 September 2012 price list included discounts not only for the town of Zagreb (Zone I), but also for all other towns in Croatia (Zone II).

913. At the hearing, […] testified that […] had sent HAKOM a more in-depth explanation of the calculations submitted on 6 September 2012,[91] which is exhibit C-455 in the record. However, the Tribunal observes that exhibit C-455 is a document that does not bear a date or a signature and from which it does not transpire whether it was transmitted to any public authority (HAKOM or the CCA). Moreover, […] admitted that the calculation was "very high level"[92] or, in other words, not of the level of granularity required by Article 33(4) of the 2009 PSA. The Tribunal also notes that […] testified that HAKOM did not receive an additional substantiation of […]'s calculations dated 6 September 2012:

> "MS DAVIES: Is there any attachment to this letter, […]?
> […]: No, it would be listed here. It would be customary to list any attachments.
> MS DAVIES: When […] sent you this letter of 6 September 2012, did it also provide you with data that would allow you to verify whether the real cost, in fact, kuna 1.30? [sic]
> […]: Documentation already existed because my colleagues who worked on cost accounting, they had all the cost information in great detail at that time."[93]

[84] […] (Exhibit C-359).
[85] […] (Exhibit C-99).
[86] […] (Exhibit C-115).
[87] […] (Exhibit C-363).
[88] […] (Exhibit C-120).
[89] […] (Exhibit C-128).
[90] […] (Exhibit R-65).
[91] Tr., Day 5, 147:25 – 148: 1-14.
[92] Tr., Day 5, 192: 12.
[93] Tr., Day 6, 109: 7-18.

914. *Third*, the Tribunal finds that, in 2012 and 2013, HAKOM abdicated from its duties to regulate […]'s discounts and to ascertain whether these discounts brought […]'s prices below the unit cost.

915. The Tribunal notes that, in mid-July 2012, HAKOM requested from […] an elaboration of the discount category of "at least 7%" included in […]'s price list of 21 June 2012.[94]

916. However, this request did not come until weeks after […] purported to amend its price list. By this time, HAKOM had already received two complaints from […], in which the latter alerted the regulator that […] was poaching its clients with discounts of between 35% and 50% that had not been included in the official price list.[95]

917. HAKOM clearly considered that […]'s price list did not comply with the 2009 PSA's requirements of transparency and non-discrimination. In a letter to […], HAKOM stated:

> "Article 33 Paragraph 2 of the Postal Services Act (Public Gazette no. 88/09 and 61/11; hereinafter referred as PSA) prescribes that the provider of universal postal services may give rebates to users that are sending a larger number of mails under the condition of such rebate being covered by the Postal Services Pricelist as well as applied equally to all users that are sending their mails under similar conditions. From the submitted scale of rebates thereof, and first of all for the rebate stated in the line 4 (over 10,000,001 mails per annum – rebate of at least 7 %), the biggest possible amount of that rebate has not been stated as well as the way of its application has not been transparently established, reading 'equally for all users that are sending their mails under similar conditions', pursuant provisions of PSA.
>
> In addition, HAKOM needs to get an explanation and more detailed elaboration of the questionable rebate class in order to establish the amount of rebate in a transparent way and in relation to the quantity of mails (letters) over 10,000,001 per annum or legality of the submitted Pricelist accordingly." [96] [emphasis added]

918. Despite having reservations as to the legality of the price list, HAKOM imposed no measure in this regard, and the price list continued to apply and to produce effects on the market. Moreover, despite being fully aware of the seriousness of the allegations levied by […] against […] and of the blatant breach of the 2009 PSA's provisions on transparency and non-discrimination, HAKOM did not direct the universal service provider to provide the requested clarifications by any specific deadline. In effect, […]'s answer to HAKOM only came on 6 September 2012, almost three months after […] had amended its price list.

[94] […] (Exhibit R-54).
[95] […] (Exhibit C-60); […] (Exhibit C-68).
[96] […] (Exhibit R-58).

919. In the interim, […] was permitted to make use of its illegal price list. […] did precisely this by signing, on 9 July 2012, an agreement with ZABA which included discounts of up to 55%.[97] The record does not establish that, upon offering these terms to ZABA, […] offered them to all similarly situated clients and potential clients. On the most generous of interpretations, […] only extended these discounts to other clients and potential clients once it amended its price list again, on 4 September 2012. Once again, the resulting lack of transparency and discrimination did not seem to preoccupy HAKOM excessively.

920. When, on 6 September 2012, […] did submit an explanation to HAKOM with respect to its discounts and clarified that reductions of "at least 7%" in actuality meant reductions of up to 55%,[98] HAKOM did not react in any way. Despite the fact that, on the face of it, […] was only purporting to calculate the cost of one out of 433 activities ("registered mails in domestic traffic received individually") and to only establish that "the real cost of a mail sent in the area of the Town of Zagreb" was HRK 1.30, HAKOM made no further inquiries with […] regarding the costs of all remaining 432 activities or the cost of delivering mail to other towns in Croatia, where discounts of up to 46% were applicable. HAKOM did not question the cost justification of the discount scale proposed by […], which provided that users sending between 5,000,001 and 10,000,000 mail items were offered a 5% discount, whereas users sending over 10,000,001 mail items were offered discounts of 40%-48%, depending on the delivery zone.

921. The Tribunal notes that […] testified at the hearing that HAKOM had in fact performed an analysis of […]'s discounts based on the cost information available to it as part of HAKOM's ongoing cooperation with […] for the implementation of separate cost accounting:

> "MS DAVIES: […], did the economists prepare a note setting out the conclusions of their analysis about […]'s prices and discounts? Did they send you an email?
> […]: No, they did not send to me, they told me that. Well, lawyers write and economists calculate. They did not write to me, they just informed me. […] who was head of the cost accounting project relayed that to me orally that information, which my colleagues were working on the cost accounting model.
> THE PRESIDENT: Sir, you find sufficient to hear that on the telephone, you do not want to check whether the economists did their work properly or to see the result on paper?
> […]: You see, […], he was next door to me. He did not phone me. He told me face-to-face. I believe that he was a greater authority in that area. I had respect for him given his long years of experience. I think that his master's degree and his PhD were in economics."[99]

[97] […] (Exhibit C-378).
[98] […] (Exhibit R-65).
[99] Tr., Day 6, 111: 11-25; 112: 1-6.

922. The Tribunal finds that this testimony is simply not credible. The record does not support the conclusion that HAKOM performed any analysis with respect to […]'s discounts in September 2012 or thereafter. Had Respondent had in its possession such evidence, undoubtedly it would have placed it onto the record. Further, the Tribunal has already concluded that, in September 2012, […]'s cost accounting system had not been fully completed and, more importantly, it had not been verified. Even if HAKOM had relied on information provided by […] from other channels, which has not been demonstrated, […]'s calculations may not have been accurate.

923. The Tribunal also notes that […] , testified at the hearing that no proposals were put to HAKOM's Council with respect to [..]'s discount calculations and that those calculations were not reliable:

> "MR PORTWOOD: So do you recall receiving a copy of the letter in September – well, around 6 September 2012?
> […]: Yes, I went through my files and we had a meeting on September 13 to deal with this topic.
> MR PORTWOOD: What we see in this letter […] is that […] responds to HAKOM's request that there be more detail on the rebate above 10,000,001 items of mail and provides that detail, correct?
> […]: Yes, they do provide it but I have to answer that this is absolutely an insufficient document for the reason that it was made according to the development model of the accounting practices that wasn't functional and had not been authorised.
> There is the additional question of why the HAKOM Council, in its sessions, did not receive this, or accept this or reject this? So this is the key question, why this was not discussed at the Council when this is an issue within the zone of responsibility of HAKOM's Council.
> MR PORTWOOD: You said that there was a meeting on 13 September following this. That was a meeting of whom?
> […]: That was a meeting that was led by […]. He only presented the content of this letter without any proposals how to proceed further and without forwarding this letter to the Council for decision-making."[100][emphasis added]

924. When […] amended its price list in December 2012 and January 2013 and started offering a more gradual discount scale based on the same calculations as those included in its 6 September 2012 letter,[101] HAKOM again completely failed to react. HAKOM likewise failed to ask any questions or to make any inquiries when, on 21 October 2013, […] submitted a revised explanation of its discount policy dated 6 September 2012.[102]

[100] Tr., Day 3, 211: 25; 212: 1-25; 213: 1-6.
[101] […] (Exhibit C-363).
[102] […] (Exhibit C-370).

925. The Tribunal observes that, according to […]'s submission to the CCA on 3 August 2015, HAKOM had not responded to any one of […]'s letters regarding discounts to large volume users:

> "After 6 September 2012, […] sent the following three letters to HAKOM:
> - letter no. DP2-025033/12 of 18 January 2013 relating to the delivery of the Decision on discounts for the universal services of reception, sorting, transport and delivery of letters weighing up to 2000 grams of 16 January 2013 (which is attached to the letter)
> - letter no. DP2/025033/12 of 4 February 2013, with additional clarification of the meaning of '*' indication in the table from Article 1 of the Decision on discounts for the universal services of reception, sorting, transport and delivery of letters weighing up to 2000 grams, which was submitted in the previous letter, and
> - letter no. DP2-8545/12 of 21 October 2013, which contains a supplement of the clarification of discount policy submitted to HAKOM in 2012 (clarification referred to in this letter was also submitted to the Agency on 18 October 2013), which was submitted by […] to HAKOM during its analysis of […]'s regulatory reports for 2012.
>
> […]
>
> […] does not have HAKOM's official responses to the submitted letters, given that pursuant to the Postal Services Act HAKOM can, at any time by means of a decision, in whole or in part, amend or abolish the prices for universal services, before or after their publication, if it determines that they are contrary to the provisions of the Postal Services Act (Article 46(5) of the Postal Services Act). In other words, given that HAKOM did not respond to […], and hence did not question any part of the price list, and therefore it did not question the discount scale for […]'s universal service, of which […] regularly and in accordance with law informed HAKOM, HAKOM confirmed the legality of the pricing policy."[103]

926. In other words, during three years and seven months of regulatory supervision of […]'s prices and discounts, HAKOM did not once verify […]'s representations as to the cost justification of its discounts. HAKOM performed its purported regulatory supervision by relying unquestioningly on the information provided by the entity it was its mission to regulate.

927. Moreover, during this time, HAKOM did not adopt any decision with respect to […]'s prices and discounts. This is confirmed by […], who testified as follows with respect to HAKOM's regulatory supervision during 2012:

> "MS DAVIES: In response to a question from counsel for Croatia, you said that the letter from HAKOM to the Ministry of Transport dated 28 June 2012 […] the letter concerning […]'s prices and discounts, you said:
> 'Was an exercise in evading taking a decision'.
> Can you please explain what you meant?

[103] […] (Exhibit C-358).

> […]: I wanted to say that the Council was comprised of seven members, a collegial body. The legislator gave, according to the law, the way to adopt decisions. […] There were not seven members in the Council so that optional meetings would be held through some workshops or some courses which have no authority and decisions are not made. […] This is a typical example of how they avoided putting key topics to the Council for decision-making.
> MS DAVIES: When you say they needed to take a decision, which decision are you referring to?
> […]: If it is about the price for universal services with regards to the reserved area, this decision is made – the law prescribes this precisely – can be made only by the Council and no one else, it is not made by the separate individual members but the Council is supposed to make this decision.
> […]
> MS DAVIES: To your knowledge, in 2012 while you were still a member of the Council, did the Council ever approve the prices of […]'s reserved services?
> […]: No, they never approved it. They could not have done so because they were not at the sessions."[104]

928. On the basis of the above, the Tribunal finds that HAKOM abandoned its statutory duty to regulate […]'s discounts and to verify if […]'s prices were below unit cost.

929. *Fourth*, the Tribunal finds that HAKOM failed to respond and to seriously consider […]'s numerous complaints against […] and thus to ensure a level-playing field on the market for postal services.

930. The Tribunal observes that, on 5 March and 6 May 2012, […] requested that HAKOM initiate an expert supervision of […], alleging that […] had failed to implement separate cost accounting and was subsidizing its business centered on other postal services based on income from reserved postal services.[105] Despite the seriousness of […]'s allegations, HAKOM only reverted to […] four and a half months later, on 19 July 2012, requesting further information.[106] After […] provided this information on 7 August 2012 and complained about HAKOM's inactivity,[107] HAKOM did not revert to […] until 11 February 2013, when it dismissed the request for an expert supervision of […]'s prices under the 2009 PSA on the grounds of the entry into force of the 2012 PSA.[108] In other words, HAKOM strategically delayed answering […]'s complaint until it was too late to intervene. In the Tribunal's view, HAKOM's conduct amounts to a refusal to consider […]'s complaint.

[104] Tr., Day 3, 215: 4-15, 20-25; 216: 1-12; 217: 10-15.
[105] […] (Exhibit C-47); […] (Exhibit C-54).
[106] […] (Exhibit C-85).
[107] […] (Exhibit C-90).
[108] […] (Exhibit C-128).

931. The Tribunal also finds that […]'s complaint against […] for breach of the 2009 PSA on account of predatory discounts was treated in a similar manner.

932. The Tribunal notes that, on 31 May 2012, […] filed a complaint against […] with a number of Croatian public authorities alleging that […] was breaching both the 2009 PSA and the Croatian Competition Act by offering massive, selective discounts not envisaged in its official price list.[109] This complaint was forwarded to HAKOM by the Ministry of Transport on 8 June 2012[110] and was refiled by […] with HAKOM on 27 June 2012.[111]

933. On 28 June 2012, less than three weeks after […] submitted its initial complaint and without having conducted any investigation into the substance of the allegations, HAKOM had already made up its mind to dismiss it.[112] The Tribunal considers that it is useful to render below HAKOM's reasoning:

> "HAKOM did not find anything contrary to the provisions of the PSA in the submitted decision on approved dicounts [sic]. Such volume discounts, if they are transparent, nondiscriminatory and allowed, are as a rule compliant with market competition rules in view of their justification in cost reduction, and arise as a result of savings due to ordering a larger service volume.
>
> Following from all the above, HAKOM believes that […], as the universal postal service provider, is entitled to grant discounts to users who send a larger number of mail items provided that such a discount has been foreseen under the postal service price list. In light of the incomplete and unclear statement made by […] as to the distortion of market competition by […] through setting and applying the price list and volume discounts, HAKOM cannot respond to the above without additional explanation and information, which will be requested from […] in the course of further procedure."[113] [emphasis added]

934. The Tribunal considers that the wording chosen by HAKOM shows that, despite purporting to require additional information from […] in order to substantiate its allegations, HAKOM was already inclined to dismiss the complaint. Moreover, HAKOM's wording also shows that the postal regulator had not in fact examined […]'s discounts. This conclusion is supported by the record, which shows that it was only on 17 July 2012 that HAKOM made some inquiries with […] with respect to its discounts.

935. The Tribunal notes that […], the head of HAKOM's Postal Services Department, testified at the hearing that HAKOM saw […]'s allegations of massive discounts not envisaged by […]'s price list as mere "gossip":

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[109] […] (Exhibit C-60).
[110] *See*, […] (Exhibit R-55).
[111] […] (Exhibit C-68).
[112] […] (Exhibit C-69).
[113] *Id*.

> "MS DAVIES: […], they had told you, had they not, that […] was granting discounts that were not envisaged in the price list and that would have been a violation of the Postal Services Act, would it not?
> […]
> […]: It is not specific. Along with that letter, they do not submit the offers of […].
> MS DAVIES: […], how would […] have – how would […] have access to offers made by […] to its customers? […] had presumably heard about those offers from its clients but how would it have the evidence? Would you not as the regulator be able to get that evidence?
> […]: The regulator does not operate on the basis of rumours.
> […]
> MS DAVIES: You are the regulator, […] is the State-owned public operator. It is the dominant provider of postal services on the market. You are faced with allegations that […] is offering discounts that are not envisaged in the price list, that those discounts are very large, that they probably bring the discounted prices below the unit cost and you were satisfied with a phone call where you were told that none of those allegations were true. That was enough for you as regulator?
> […]: It was enough. On the other hand, as I said, all we had were allegations and gossip. There was no evidence. I mean […] by the other side."[114]

936. At the hearing, […] attempted to explain that HAKOM did perform some investigations into […]'s allegations by calling a representative of […] and questioning them about the discounts […] was allegedly offering.[115] Regardless of the fact that […]'s shifting testimony was not credible as he appeared not to remember if he spoke on the phone to […] or to […] or whether he had taken part in a conference call with several people from […], what […] attempted to describe could not, even under the most generous of interpretations, be qualified as an investigation into […]'s discounts. It would simply amount to a regulator taking the regulated entity at its word without any verification of its own.

937. The Tribunal notes that, after its 28 June 2012 answer to […]'s complaint, HAKOM reverted to […], requesting additional evidence and clarifications that would substantiate its complaint against […]. Nevertheless, the Tribunal considers that this request for information was a mere pretense of form, as HAKOM failed to investigate […]'s allegations or to take any further action.[116]

[114] Tr., Day 6, 92: 21-25; 93: 8-19; 102: 22-25; 103: 1-11.
[115] *See*, Tr., Day 6, 98-103.
[116] The Tribunal finds that the expert supervision of […] conducted by HAKOM between 3 and 18 December 2012 concerned the provision of postal services and was completely unrelated to […]'s discount policy (*See*, […], Exhibit R-78).

938. Indeed, after […] provided HAKOM the requested information and clarifications in August 2012, [117] HAKOM did not respond. HAKOM did not inform […] of the explanations provided by […] in September 2012. Moreover, as the Tribunal has already determined above, HAKOM did not independently check […]'s calculations in 2012 in order to determine if its discounted prices were inferior to its unit cost.

939. When […] reminded HAKOM of its unanswered complaint, on 11 February 2013, HAKOM informed it that there were "no conditions for subsequent establishment of infringements" of the 2009 PSA by […] since the 2012 PSA had just entered into force.[118] In other words, similarly to […]'s request that HAKOM initiate an expert supervision of […], HAKOM delayed answering […]'s complaint that […] was breaching the 2009 PSA through its discount policy until the 2012 PSA had entered into force and then used this to argue that it was too late to intervene.

940. The Tribunal therefore concludes that HAKOM abdicated its role as regulator of the postal services market by utterly failing to regulate […]'s prices and discounts and ignoring repeated complaints from […] alleging serious violations of the postal law. The Tribunal considers that the substantial difference in treatment between the two postal operators – with […] being permitted to offer massive and, at points, non-transparent discounts on the market without any supervision, and with […]'s repeated complaints being completely ignored or dismissed without any investigation – demonstrates that HAKOM's dereliction of duties was motivated by a desire to protect the national postal operator.

941. For these reasons, the Tribunal finds that Respondent's conduct was arbitrary and breached Article 3(1) of the Treaty. Having already found a breach of the Treaty on account of arbitrariness, the Tribunal considers it unnecessary to investigate whether this same conduct breached Claimant's legitimate expectations or amounted to an impairment of Claimant's investment by unreasonable or discriminatory measures.

4. Whether the CCA repudiated the applicable Croatian competition law principles

942. The Tribunal recalls its finding at Section VII.C.3 above that it is not empowered to sit in appeal against decisions taken by regulatory agencies at the State level.[119] The FET standard cannot be equated with the misapplication of national law and something more is required than mere error in order to demonstrate a breach of the Treaty:

[117] […] (Exhibit C-85); […] (Exhibit C-90).
[118] […] (Exhibit C-128).
[119] Lemire v. Ukraine Decision on Jurisdiction and Liability, at 283.

> "The Tribunal has approached this question on the basis that it is not every process failing or imperfection that will amount to a failure to provide fair and equitable treatment. The standard is not one of perfection. It is only when a state's acts or procedural omissions are, on the facts and in the context before the adjudicator, manifestly unfair or unreasonable (such as would shock, or at least surprise a sense of juridical propriety) – to use the words of the *Tecmed* Tribunal – that the standard can be said to have been infringed."[120] [emphasis added]

943. In the words of the *Eastern Sugar v. Czech Republic* tribunal:

> "A violation of a BIT does not only occur through blatant and outrageous interference. However, a BIT may also not be invoked each time the law is flawed or not fully and properly implemented by a state. Some attempt to balance the interests of the various constituents within a country, some measure of inefficiency, a degree of trial and error, a modicum of human imperfection must be overstepped before a party may complain of a violation of a BIT. Otherwise, every aspect of any legislation of a host state or its implementation could be brought before an international arbitral tribunal under the guise of a violation of the BIT. This is obviously not what BITs are for."[121] [emphasis added]

944. The Tribunal considers that a certain level of deference is due to national agencies, tasked to regulate highly technical and specialized fields of economic activity (such as the CCA), with regard to their assessment of whether particular forms of conduct ran counter to the prescriptions of national law. The Tribunal thus aligns itself with the finding of the *Saluka v. Czech Republic* tribunal that a regulator's decision taken in the application of its competence pursuant to national law is entitled to some deference.[122] However, this deference will not impede the Tribunal's task to verify if international law was complied with:

> "[A]lthough the role of an international tribunal is not to second guess or to review decisions that have been made genuinely and in good faith by a sovereign in the normal exercise of its powers, it is up to an international arbitral tribunal to sanction decisions that amount to an abuse of power, are arbitrary, or are taken in manifest disregard of the applicable legal rules and in breach of due process in regulatory matters."[123] [emphasis added]

945. For the reasons set out in the paragraphs below, the Tribunal has concluded that the 2012 and 2015 CCA Decisions, despite containing a number of errors in the application of the relevant principles of competition law, nevertheless do not evidence a repudiation of these principles, a lack of due process or a failure by the CCA to discharge its duties under Croatian law. They do not therefore amount to violations of Article 3(1) of the Treaty.

[120] AES v. Hungary, at 9.3.40.
[121] Eastern Sugar v. Czech Republic, at 272.
[122] Saluka v. Czech Republic, at 272, 273.
[123] TECO v. Guatemala, at 493.

i. The 2012 CCA Decision

946. The Tribunal notes that the CCA rendered its 2012 Decision after a procedure that complied with the requirements of due process. […] was allowed to supplement its complaint against […] twice.[124] Before deciding, the CCA requested information from […],[125] from […][126] and from HAKOM.[127] Further, the 2012 CCA Decision was reasoned and could be appealed before the Croatian courts.

947. The CCA first attempted to identify the relevant product market and whether it allowed competition. The CCA concluded that the delimitations included in the 2009 PSA between the universal postal service and other postal services corresponded to two different product markets:

> "The primary task of the Agency is to confirm whether it is the case of the market which allows competition. In other words, the Agency's first task is to confirm if on the said market competition is allowed or there is legal monopoly and is therefore closed for the competition because it is regulated by special, legal, sub-legal acts and precisely defined rules and conditions.
>
> So, the Agency must confirm if rules on the protection of competition can be applied to certain markets or is it the case of markets or activities on which, due to certain public interest, there is no freedom of competition, but all important conditions according to which the competition is carried out on such markets, such as prices, discounts etc. are defined by special laws and therefore are not subject to the control of this Agency, but the control of those markets is carried out by a certain regulator or other authorized government body.
>
> In this case it is the market which is precisely defined by the Postal Services Act, which differentiates the universal postal services market and other postal services market. In that, universal postal services and pertaining specifically reserved universal postal services belong to the sphere of public interest protected by Postal Services Act, while other postal services, among them the services with the added values, are situated on a completely open and entirely liberalized market."[128] [emphasis added]

948. The CCA then established the positions of […] and […] on these markets. The CCA concluded that […] could not compete with […] on the market for universal postal services because […] did not have a license to provide this type of service and […] held a legal monopoly on reserved services:

> "The Agency confirmed that […] is in dominant position on the market of universal postal service, more exactly reserved letters, based on the legal monopoly defined by the Postal

[124] […] (Exhibit C-88); […] (Exhibit C-103).
[125] […] (Exhibit C-91).
[126] […] (Exhibit C-475).
[127] […] (Exhibit C-482).
[128] […] (Exhibit C-112).

> Competition Act as a special regulation.
>
> […]
>
> Considering that the said discounts of […] refer to the universal postal services market, and taking into consideration that in accordance with the decision of HAKOM, class: […] in the procedure of profession audit, it has been confirmed that […] provides postal service with added value, the Council estimated that, at the time when […] sent the quotations with the discounts to the universal postal services users, […] was not a competitor of […] on the universal postal services market, considering that at the time it did not have legally defined licence to provide those services, while at the same time according to Article 9 Paragraph 3 of the Postal Services Act, the right and the obligation of providing reserved universal postal services is the exclusive prerogative of […]." [129] [emphasis added]

949. In reaching its conclusion that […] could not legally compete with […], the CCA also relied upon HAKOM's representation that it had verified […]'s prices:

> "At the same time, the Postal Services Act gives direct authorities [sic] to HAKOM as a sector regulator, to approve the prices of those services as stated in Point II of the explanation of this conclusion.
>
> Related to all the above stated, HAKOM, as stated in point IV of this conclusion, in its response of 12 November 2012 pointed out that in its analysis of said discounts, it did not consider them discriminatory, considering that they are equally applied to all users of services provided by […].
>
> Also, in this particular case, the discounts that […] offers to its users who send a larger number of letters refer to the universal postal services, are predicted in the postal services Price List, and are not entirely or partly amended or annulled by HAKOM, before or after their publication, in application of Article 33 Paragraph 3 of the Postal Services Act." [130] [emphasis added]

950. On the basis of the above, the Tribunal concludes that the CCA complied with due process, correctly identified the relevant facts and the applicable law, and made an earnest, good faith effort to apply that law to the facts. The Tribunal agrees with Claimant that the 2012 CCA Decision contains a number of errors, as developed below. However, in the Tribunal's view, the errors in the 2012 CCA Decision do not demonstrate an outright repudiation of the applicable rules of competition law or a manifest failure by the CCA to discharge its mandate. The Tribunal finds that the mistakes in the 2012 CCA Decision are nothing more than the incorrect application of national law and are not enough to represent a breach of Article 3(1) of the Treaty.

[129] *Id*.
[130] *Id*.

951. Claimant complains that the CCA failed to carry out an economic analysis of demand substitutability before reaching the conclusion that […]'s reserved postal services were not on the same relevant market as […]'s value-added postal services. Claimant takes issue with the CCA's exclusive reliance on the 2009 PSA for purposes of a relevant product market analysis. In other words, Claimant complains that the CCA confused the classification of postal services for purposes of *ex ante* regulation, as per the 2009 PSA, with the definition of different product markets, for purposes of an *ex post* competition law analysis. The Tribunal observes that the CCA correctly identified the legal question to be answered – whether the services offered by […] and […] were on the same product market – and referred to one of the relevant factors that could provide an answer to that legal question. Indeed, Claimant does not dispute that the applicable regulatory framework is an important consideration when undertaking an analysis of the relevant product market. The Tribunal does not agree with Claimant that the error of judgment made by the CCA is anything more than a mistake in the application of the law.

952. The Tribunal also agrees with Claimant that the CCA afforded considerable weight to HAKOM's *ex ante* regulation of the postal services market, whereas, in actuality, HAKOM had failed in its mandate to regulate […]'s prices and discounts. However, again, the Tribunal observes that it is not in dispute that the *ex ante* regulation of a dominant enterprise's prices is a relevant factor to take into account in an *ex post* competition law analysis. In other words, the CCA correctly identified one of the legal principles applicable to its analysis. Moreover, the Tribunal observes that the CCA's findings with respect to HAKOM's supervision of the postal services market were based on the false representations made by HAKOM in its submission to the CCA dated 12 November 2012. More precisely, the CCA found that the 2009 PSA gave HAKOM "direct authorit[y] … to approve the prices of [reserved postal services]" and that HAKOM had explicitly represented that "in its analysis of said discounts, it did not consider them discriminatory, considering that they [were] equally applied to all users of services provided by […]".[131] Indeed, in its submission to the CCA, HAKOM had represented that […]'s discounts were justified by savings in costs and that it had analyzed these discounts and found them to be non-discriminatory:

> "In accordance with Article 33, paragraph 2 of the PSA, […] made a business decision to grant a discount to users who send significant amounts of postal items from the universal scope, that is, for receiving, directing, transferring and delivering postal items of up to 2 kilograms, from Article 8 of the PSA. <u>These are only quantity-based discounts with an economic justification in the sense that they decrease costs and result from the savings due to orders of larger quantities of services. In its analysis, HAKOM did not consider these discounts to be discriminatory, since these apply in the same manner to all the users of the</u>

[131] *Id*.

> services offered by […]. […] notified HAKOM of this decision in a memo dated 18 May 2012, and the discounts, as an integral part of […]'s price list, were published on […]'s web site on 5 June 2012. On [21] June 2012, […] delivered to HAKOM a correction of the above decision. On 19 July 2012, HAKOM requested an elaboration of the above decision. On 6 September 2012, HAKOM received the requested elaboration based on an economic justification, all according to the conclusions of a meeting with the public operator held on 19 July 2012. In its memo, […] stated that the quantity-based discounts are based on the calculation by virtue of the model of separate cost accounting and that this accounting model, although in a development stage, provides enough parameters which makes it possible to determine the actual cost of a particular service or group of services."[132] [emphasis added]

953. The Tribunal considers that it was not unreasonable for the CCA to place trust in the postal regulator's statement that it had made a determination that […]'s discounts complied with the applicable postal legislation. While it would have been preferable for the CCA to have investigated the matter further, the Tribunal does not share Claimant's view that its decision to take the postal regulator at its word was a grave error of judgment.

954. The Tribunal also agrees with Claimant that the CCA failed to consider the possible effects in a neighboring market of an abuse of a dominant position on the relevant product market, as well as the continuing effects of […]'s discounts on a liberalized postal services market, post 1 January 2013. However, it appears to the Tribunal that these were not central points in […]'s complaints. The Tribunal is also not persuaded that the CCA should have ascertained if […] had abused its dominant position by granting discounts on its transactional letter service, considering that […] had not submitted this complaint at all.

955. While the CCA should have been more diligent and carried out the analyses referred to above, the Tribunal does not consider that failures of this nature, without more, can be sanctioned under an investment treaty. If the CCA in good faith erred in its application of competition law but did not act arbitrarily, it is not the Tribunal's task to correct these errors of law.

956. For all these reasons, the Tribunal cannot agree with Claimant's position that the CCA's Decision was manifestly unfair or unreasonable or that it represents something more than an incorrect application of Croatian competition law so as to constitute an effective "repudiation of [competition] rules altogether".[133] The Tribunal therefore finds that Respondent did not breach Article 3(1) of the Treaty through arbitrary conduct, as a result of the 2012 CCA Decision. In light of its findings that the 2012 CCA Decision was reasoned, was issued following due process and contained the CCA's good faith attempt

[132] […] (Exhibit C-468).
[133] Reply, at 458.

to apply the correct law to the correct set of facts, the Tribunal also finds that Claimant's claim for breach of legitimate expectations is without merit.

ii. The 2015 CCA Decision

957. After careful consideration, the Tribunal finds that, by issuing the 2015 CCA Decision, Respondent did not fall foul of the requirements of Article 3(1) of the BIT.

958. The Tribunal observes that the 2015 CCA Decision was issued following a procedure which observed due process. Indeed, the CCA requested information and comments from […], […] and HAKOM on several occasions, met with representatives of HAKOM and […] for further clarifications, and sought and obtained […]'s Regulatory Reports.

959. Further, the 2015 CCA Decision is reasoned. It contains an in-depth analysis of the legal questions before the CCA. The CCA examined the legislation on the postal services market, focusing in particular on the *ex ante* regulation of prices and discounts. The CCA then proceeded to identify the relevant product and geographic markets, noting in this regard:

> "In establishing the relevant market, pursuant to Article 8, paragraph 1 of the Regulation on Definition of the Relevant Market, the most immediate criterion is the demand substitutability of the particular product, then also the supply substitutability of the particular product, and when necessary, the criterion of the existence of potential competitors or barriers to entry. Pursuant to the provisions of paragraph 2 of the same Article, applying the criteria previously mentioned, the relevant market is defined with a view to defining and differentiating the market segments of particular products in which undertakings compete with one another."[134]

960. The CCA found that the relevant product and geographic markets were the provision of letter post services in the entire territory of Croatia. Thereafter, the 2015 CCA Decision analyzed the Croatian postal market and found that […]'s market share was 78.6% in 2013 and 78.4% in 2014, whereas […] held 17.4% of the market in 2013 and 17.7% in 2014. Referring to the CJEU jurisprudence, the CCA concluded that, based on its market share and due to its quality as the historical national operator, […] was in a dominant position on the relevant market.

961. The CCA then examined […]'s price lists in 2013 and 2014, as well as the contracts it had concluded with high volume customers. The CCA found that these contracts had been concluded on the basis of the prices and discounts contained in […]'s official price lists.

[134] […] (Exhibit R-137).

962. The CCA subsequently verified if […]'s discounts had been granted by foregoing profits. The CCA relied upon the *Akzo* and *Tetra Pak II* cases, as well as on the Guidance on the Commission's Enforcement Priorities. The CCA used the cost information included in […]'s 2013 Regulatory Report and BDO Croatia's audit, but maintained that, in addition to this information, "specific data were also obtained on costs, which in essence stem[med] from and [were] complementary to the information from the Regulatory Report for […] for 2013".[135] The CCA then ran the price-cost test both at the market level and at the level of the individual user. For this analysis, the CCA decided to treat the majority of […]'s staffing costs as fixed costs in light of […]'s universal service obligation. The CCA found that, at the market level, […]'s average total revenue covered its average total cost, while at the individual user level (determined for the high-volume users […] and […]), […]'s prices were lower than average total costs but higher than average variable costs.

963. Having found that, at the individual user level, […]'s prices were below average total costs, the CCA went on to assess whether […]'s conduct betrayed the intent to limit competition on the market. The CCA referred to the regulatory environment relevant to assessing […]'s conduct and in particular to HAKOM's power to regulate […]'s prices and discounts. After examining the correspondence between HAKOM and […], the CCA concluded:

> "Taking into account these provisions of the legislation on postal services and the active supervision of discounts on the prices of the universal service of […], within the framework of the ex ante regulations, the Agency deems that the provision of services by […] according to the price list of services, which was the subject of ex ante regulation in the appropriate manner, essentially excludes any certain conclusion that there was any unilateral exclusionary conduct by […], within the meaning of the regulations on protection of market competition.
>
> Here the Agency additionally emphasizes that, pursuant to the provision of Article 46, paragraph [sic] of the PSA, HAKOM may, by a decision, completely or partially amend or revoke the prices of the universal service before or after their publication, as well as the special prices referred to in paragraph 4 of the same Article, if it establishes that they are in contravention of the provisions of the PSA.
>
> From the examination of the observations by […] of 19 July 2013, in essence it stems that HAKOM, as the sector regulator, actively monitors […]'s price policies, and that […]'s prices were never the subject of amendments by HAKOM.
>
> From […]'s additional observations of 3 August 2015, the same conclusion may be drawn in essence, in the sense that HAKOM did not react towards […], that is it did not question any part of the price list, including the scale of discounts for the universal service of […]. […], thereby presents the logical point of view that HAKOM thereby confirmed the lawfulness of […]'s pricing policies." [136] [emphasis added]

[135] *Id*.
[136] *Id*.

964. The CCA continued its analysis with an examination of the possible selectivity of […]'s discounts, noting that this was closely linked to its previous analysis of intent. The CCA observed that […]'s discounts were included in a price list that was public and that […] had been providing postal services to high volume users such as […], […], […] and […] simultaneously with […] since before the liberalization of the postal services market. The CCA considered that […]'s prices were not selective in 2013 due to the fact that […]'s volumes for major users were superior to […]'s and that […] was attempting to retain the services of these users on a more competitive liberalized market. Referring to CJEU jurisprudence, the CCA found that "the dominant undertaking [could] not be denied the right to protect its own commercial interests or economic interests if they [were] attacked" and that a dominant undertaking "must be conceded the right to take such reasonable steps to protect its own commercial or economic interests"[137] so long as these measures are proportionate.

965. For these reasons, the CCA declined to find a breach of the Croatian Competition Act by […].

966. On the basis of the above, the Tribunal finds that, in the 2015 CCA Decision, the CCA abided by the requirements of due process, correctly identified the relevant facts and applicable law, and applied the law so identified to those facts. Claimant argues that the 2015 CCA Decision contains a number of errors in the application of competition law principles. That may well be the case. However, as is detailed below, the Tribunal considers that it is not its role to correct simple errors of judgment made by the CCA. In any event, the Tribunal does not share Claimant's view that those errors are significant enough to warrant a conclusion that the CCA repudiated the applicable rules of competition law or manifestly failed to discharge its mandate. The 2015 CCA Decision does not therefore constitute a breach of Article 3(1) of the Treaty.

967. In this respect, the Tribunal observes that Claimant's most important criticism of the 2015 CCA Decision is that the CCA misapplied the price-cost test at the individual user level. In Claimant's submission, instead of referring to […]'s average costs that would have been avoided if […] stopped delivering small letters, the CCA incorrectly used […]'s average costs that would have been avoided if […] no longer provided the universal service of letter post to an individual user. Claimant argues that this misapplication of competition law principles was not merely technical, but glaring and in direct contradiction to the CJEU judgment in *Post Danmark I*:

[137] *Id*.

> "a pricing policy such as that in issue in the main proceedings cannot be considered to amount to an exclusionary abuse simply because the price charged to a single customer by a dominant undertaking is lower than the average total costs attributed to the activity concerned, but higher than the average incremental costs pertaining to the latter". [138] [emphasis added]

968. The Tribunal considers that a finding that the CCA made an error of law is not sufficient to demonstrate a breach of the Treaty. A violation of the FET standard requires the submission of evidence that a national regulatory authority acted in an arbitrary or capricious way. The Tribunal considers that the evidence put forward by Claimant with respect to the CCA's price-cost test does not meet this threshold and that Claimant's criticism goes only to the substantive correctness, as opposed to the possible arbitrariness, of the CCA's holding.

969. This conclusion is even more appropriate with respect to Claimant's contention that the CCA, on the basis of its incorrect application of the price-cost test, incorrectly determined what Claimant deems to be the largest component of […]'s avoidable costs: labor costs. It is certainly not the role of this Tribunal to ascertain which proportion of […]'s labor costs was avoidable and which proportion was unavoidable. Such task is for a national regulatory authority and national courts and will not be reviewed by an international investment tribunal for correctness. Again, Claimant has failed to meet its burden and demonstrate the arbitrariness of the CCA's holding.

970. Claimant also takes issue with the CCA's analysis of the element of intent, arguing that the CCA's reliance on HAKOM's regulatory supervision cannot sustain the conclusion that the element of intent was missing. In Claimant's submission, the CCA's failure to request […]'s internal correspondence or to conduct a surprise inspection of […]'s premises amounts to a failure by the CCA to independently perform the activities within its powers. The Tribunal cannot agree. As was noted earlier, the 2015 CCA Decision contains an analysis of the element of intent. Claimant's criticism again purports to show that the CCA ran this analysis incorrectly, by relying on one relevant consideration over another. While the Tribunal may disagree with the CCA's finding with respect to HAKOM's regulatory supervision of […]'s prices and discounts, it cannot reverse the CCA's analysis on this point, as it is not manifestly arbitrary.

971. The Tribunal further finds that the same conclusions are applicable to Claimant's contention that the CCA should not have relied on […]'s 2013 Regulatory Report. Claimant contends that the CCA's analysis should not have used the costs in the […]'s 2013 Regulatory Report in light of the criticisms contained in the auditor's letter of

[138] Post Danmark I, at 37.

recommendation. The Tribunal repeats that its task under the Treaty is not to determine what documents a national regulatory authority may rely upon in order to discharge its duties. The Tribunal finds nothing unreasonable or arbitrary in the CCA's use of […]'s audited Regulatory Report. In any event, the Tribunal notes that […] ultimately concluded that […]'s 2013 Regulatory Report had been completed in accordance with the Instructions on cost accounting separation.

972. The Tribunal observes that, as argued by Claimant, the CCA did not examine both the potential retroactivity of […]'s discounts, an issue raised by […] in its complaint before the European Commission and submitted to the CCA, and the question of […]'s alleged unfair terms for access to its postal network. The Tribunal agrees with Claimant that the CCA's *infra petita* ruling is a significant failing on its part. However, the Tribunal also notes that, in its appeal against the 2015 CCA Decision before the High Administrative Court of Zagreb, […] explicitly challenged the CCA's failure to rule on these complaints.[139] The Tribunal is of the view that, while the CCA's failure to rule on these issues is significant, it is not at all uncommon for procedural errors to be committed before local regulatory authorities. As long as these errors do not show bad faith, abuse of process or arbitrariness, and there is a reasonable opportunity to remedy the procedural failing, a breach of the FET standard would be difficult to establish. In the case before the Tribunal, Claimant has not produced convincing evidence that the CCA intentionally or abusively omitted to rule on these claims. Moreover, there was a reasonable opportunity for […] to correct the CCA's errors before the national courts.

973. For all the reasons identified above, the Tribunal finds that the 2015 CCA Decision does not fall foul of Article 3(1) of the Treaty on account of arbitrariness. For these very same reasons, the Tribunal also finds that Claimant's claim for breach of legitimate expectations is without merit.

5. Whether Respondent denied […] timely and non-discriminatory access to […]'s postal network

974. After having examined the evidence in the record and the Parties' submissions, the Tribunal finds that Respondent did not breach Article 3(1) of the Treaty by denying […] fair and non-discriminatory access terms to […]'s network.

975. At the outset, the Tribunal notes that Claimant's claim that HAKOM assisted […] in denying […] timely and fair access to the public postal network, included in the Memorial,

[139] […] (Exhibit R-142).

was not reiterated in the Reply, at the hearing or in Claimant's post-hearing briefs. However, Claimant has not expressly represented that it is withdrawing the claim. Therefore, out of an abundance of caution, the Tribunal has decided to address it.

976. The Tribunal observes that […] filed with HAKOM three complaints against […] for denial of network access. […]'s first complaint was dismissed by HAKOM on account of […]'s failure to specify the beginning and the duration of the network access contract, a mandatory requirement under the Ordinance on the Provision of the Universal Service.[140] […]'s second complaint was dismissed by HAKOM on account of the fact that […] had filed a third request for access with […], for the same quantities of mail and in relation to the same sorting stations, before HAKOM had had the chance to review […]'s second complaint on the merits.[141] The Tribunal notes that […]'s first complaint was resolved in a period of three months, whereas the second complaint in a little over a month. […]'s third complaint before HAKOM was submitted on 3 October 2013 and HAKOM rendered its decision on 15 January 2014,[142] three and a half months later. In all three instances, HAKOM requested observations from, and heard, both parties.

977. The Tribunal therefore finds no support in the record for Claimant's contention that HAKOM denied […] timely access to […]'s postal network. To the contrary, the record supports the conclusion that any delay in obtaining access was also due to […]'s conduct, *i.e.*, the submission of an incomplete request for access and of a third request for access while the dispute pertaining to its second request was still ongoing.

978. The core of Claimant's complaint with regard to Respondent's treatment of […]'s requests for network access concerns an alleged failure to be heard and to provide reasons. According to Claimant, despite […]'s repeated complaints about the exclusionary nature of […]'s access prices, HAKOM never addressed this question and the High Administrative Court in Zagreb simply accepted, without any analysis, HAKOM's reasoning. The Tribunal disagrees.

979. […] argued before HAKOM that the Ordinance on the Provision of the Universal Service established cost avoidance as a guiding principle for determining network access prices. In […]'s submission, this principle had not been implemented in […]'s price list. […] pointed out that access users, on account of performing part of the service normally in the charge of […], were granted discounts of maximum 21% regardless of volume, whereas universal postal service users were granted a discount of up to 55% on volume, despite not

[140] […] (Exhibit C-150).
[141] […] (Exhibit C-170).
[142] […] (Exhibit C-210).

performing any service.[143] In other words, […]'s complaint pertained to the lack of correlation between the (non-)performance of part of […]'s service, volume and the discounts granted. […] did not argue that the absence of volume discounts for network access users created an exclusionary effect that resulted in a margin squeeze.

980. In its decision, HAKOM concluded that users of postal services and network access users were not in like circumstances and that the 2012 PSA and the Ordinance on the Provision of the Universal Service did not contain any obligation to treat these categories in the same manner. HAKOM then explained that discounts granted to network access users and discounts granted to universal postal services users were established on two different bases:

> "Furthermore, Article 53 Paragraph 6 of the Act stipulates that when defining the prices for the access to the network for the access users, it is important to consider the costs of actions carried out before accessing the network and acknowledge them as avoided costs. Also, Article 25 Paragraph 1 of the Regulation on the universal service, states that the prices of access are defined according to the percentages of the price for the appropriate service in the Price List of the universal service provider, where the price is decreased for the costs of the parts of the jobs carried out by the access user. So, the decision on prices by […], which has been delivered to the Agency, defines that the prices for the access to the network are based on appropriate prices for the letters from the area of the universal service (to which a value added tax is added) and on the prices obtained in that way, appropriate discounts are applied, depending on the access points and the level of letter elaboration. On the other hand, Article 46 Paragraph 2 of the Act does not exclude the right of the universal service provider to approve discounts to the service users who send a larger number of letters, under condition that such an amount is defined as taking into consideration the costs, then that it is foreseen in the universal service Price List and that it is applied in the same way for all users who send letter under similar conditions. Unlike network access, where only the costs of carried out/avoided steps are acknowledged, in this case only the amounts are taken into consideration, that is, the number of letters, so in practice it is likely, in the case of universal service users, to have discounts higher that [sic] the ones in the network access, which depends on the amounts of letters, which make the basic difference. Furthermore, discounts on the amount in the case of the universal service, if they are transparent and non-discriminatory, are in accordance with the regulations on market competition, because they have justification in the decrease of costs and occur only as a result of cost cutting due to the order of a larger number of services."[144] [emphasis added]

981. Regardless of the correctness of HAKOM's finding, the Tribunal observes that HAKOM addressed […]'s complaint in full and explained at length why it considered that […]'s network access prices complied with the 2012 PSA and the Ordinance on the Provision of the Universal Service. Because […] never argued that the absence of volume discounts for network access users resulted in a margin squeeze, HAKOM did not address this question.

[143] […] (Exhibit C-185).
[144] […] (Exhibit C-210).

While HAKOM could have addressed this issue of its own motion, the Tribunal considers that HAKOM did not act in an arbitrary manner by not doing so.

982. […] likewise did not argue that […]'s refusal to grant it volume discounts created a margin squeeze before the High Administrative Court in Zagreb.[145] The Tribunal therefore considers that Respondent did not run foul of Article 3(1) of the Treaty by not adjudicating it.

983. The Tribunal also observes that, in any event, Claimant's legal argument, pursuant to which network access users should be granted volume discounts (on a per sender basis, as opposed to discounts in the aggregate), in addition to operational discounts, appears to be novel and is currently not supported by cogent authority. This was acknowledged at the hearing by Claimant's competition law expert, […]:

> "MR PORTWOOD: Looking at the [Bpost] ECJ case, decision, it is not an authority to say that universal service providers should always provide a volume discount to network access users, is it?
> […]: That is a question and a case that has never, to my knowledge, never been tested because no-one has taken this approach."[146]

984. Consequently, neither HAKOM nor the High Administrative Court in Zagreb can be faulted for failing to address the argument raised by Claimant in these proceedings, which was both novel for competition law authorities and had not been raised during the local proceedings by […].

985. Further, the Tribunal cannot agree with Claimant's contention that the High Administrative Court in Zagreb did not independently assess the merits of […]'s claim. The fact that the court relied upon the same legal texts and arrived at the same conclusion as HAKOM does not, in and of itself, demonstrate that the court performed no independent analysis. Moreover, the Tribunal considers that the court's reasoning shows that it gave independent consideration to […]'s claim:

> "Pursuant to the provisions of Article 53, paragraph 6 of the Postal Services Act (Official Gazette 144/12 and 153/13) when establishing the price of access to the postal network, it is necessary to recognize to users of access the costs of activities undertaken before accessing the network, as costs avoided by the universal service provider.
>
> Article 25, paragraph 1 of the Rules on Provision of the Universal Service (Official Gazette, 41/13) prescribes that the prices (rates) for the postal network access service are determined as a percentage of the public operator's standard rates for a respective service,

[145] *See*, […] (Exhibit R-124).
[146] Tr., Day 7, 192: 12-18.

> whereby standard rates are reduced by the cost of work performed by the user of the access service.
>
> From the information in the case file it stems that in the decision by the first plaintiff on prices, which it sent to the respondent, it is defined that the prices of access to the network are based on the appropriate prices for postal items in the realm of the universal service, on which VAT is calculated, and for the prices obtained in that way, the appropriate discounts are applied, depending on the access point and the degree of categorization of postal items. In this specific case, the second plaintiff did not provide evidence from which it could be concluded that the first plaintiff's prices for the service of access to the network were not aligned with the Postal Services Act and the Rules on Provision of the Universal Service, so in the part relating to the prices of access to the postal network, the claim by the second plaintiff was correctly assessed to be not well-founded." [147]

986. For these reasons, the Tribunal concludes that Respondent did not breach Article 3(1) of the Treaty by arbitrarily denying […] fair and non-discriminatory access terms to […]'s network. For the same reasons, the Tribunal concludes that Claimant's claim for breach of its legitimate expectations fails.

6. Whether Respondent wrongfully established […]'s compensation fund

987. The Tribunal finds that Respondent did not breach Article 3(1) of the Treaty by establishing a compensation fund for […]. Equally, Respondent's refusal to attempt to accommodate […]'s requests for a reasonable extension of the payment deadline or for permission to pay in instalments do not amount to breaches of Article 3(1) of the Treaty.

988. Claimant argues that HAKOM's errors in the establishment of the compensation fund were of such a serious nature as to undermine the very necessity of establishing a compensation fund in the first place. Claimant argues that HAKOM: (i) uncritically accepted […]'s calculation of […]'s net cost; (ii) incorrectly considered that the requirement of having 700 post offices in Croatia was restrictive; (iii) overestimated […]'s reasonable return on assets; and (iv) included a significant amount of inefficient delivery costs in its calculation. The Tribunal recalls that the FET standard is not one of perfection and allows for a certain degree of error. It is only when a State acts capriciously, without a legitimate purpose, when it repudiates the applicable law or shows preference or bias, that its conduct can be deemed arbitrary. The Tribunal is not persuaded that HAKOM's alleged errors in this regard rise to the level of arbitrariness.[148] In particular, the Tribunal finds nothing arbitrary in HAKOM's reliance on […]'s calculation of […]'s net cost and cannot accept Claimant's

[147] […] (Exhibit R-124).
[148] The Tribunal notes that, in the Reply, at paragraph 350, Claimant acknowledged that HAKOM did not incorrectly establish […]'s contribution to the compensation fund.

contention that such reliance was uncritical. In this respect, the Tribunal recalls that HAKOM was actively engaged in the process of reviewing […]'s net cost calculation and that […]'s report was issued following a series of meetings between that company, […] and representatives of HAKOM. As regards the remaining substantive errors allegedly made by HAKOM, the Tribunal considers that they are not manifest and that Claimant has failed to discharge its burden to show that they were capricious, showed bias or a repudiation of the applicable law. Moreover, HAKOM rendered its decision at the close of a procedure that entailed the participation of all interchangeable postal services providers and that complied with due process.

989. In its Memorial, Claimant alleged that HAKOM established the compensation fund in the absence of any transparency about the net cost of the universal service, in light of the fact that HAKOM only shared an excerpt of […]'s net cost calculation with interchangeable postal service providers. This claim was not reiterated in the Reply, at the hearing or in the post-hearing briefs. Nevertheless, out of an abundance of caution, the Tribunal has decided to address it.

990. After reviewing the evidence before it, the Tribunal agrees with Respondent that HAKOM's decision establishing a compensation fund was issued following a procedure that ensured due process and appropriate levels of transparency.

991. The Tribunal notes that HAKOM's decision was issued one year after HAKOM notified […] that the establishment of a compensation fund was likely and that provisions needed to be made for this eventuality in the business plan.[149] When HAKOM received […]'s request for compensation, which was accompanied by its audited financial statements, HAKOM retained the services of an independent auditor, […], in order to verify […]'s methodology and calculation. This resulted in a downward correction of […]'s net cost calculation.[150] Thereafter, HAKOM sought the views of all interchangeable postal service providers, including […], on the calculation put forward by […].[151]

992. […] refused to provide those comments, citing the insufficiency of the information offered by HAKOM.[152] Claimant contends that […] could not have provided substantive comments on […]'s net cost calculation without having the opportunity to review it in its entirety, as opposed to having access to the excerpts provided by HAKOM. The Tribunal does not find anything objectionable in HAKOM's decision not to transmit the full net cost calculation to […]'s competitors. The Tribunal considers that HAKOM had an obligation

[149] […] (Exhibit C-188).
[150] *See*, […] (Exhibit R-118).
[151] […] (Exhibit C-240).
[152] […] (Exhibit C-241).

to balance the competing interests of, on the one hand, […], who understandably did not desire that its extremely sensitive cost and pricing information be disclosed to its competitors, and, on the other hand, the interchangeable postal providers' interest to have sufficient information that would allow them to offer substantive comments on the net cost calculation. The Tribunal also observes that, while […] initially refused to provide comments on […]'s net cost calculations citing the insufficiency of the information provided, on 28 November 2014, after the expiry of the deadline for comments and after HAKOM had already rendered its decision,[153] […] was able to put forward a number of substantive criticisms pertaining to […]'s net cost calculation.[154] The Tribunal therefore concludes that Respondent cannot be sanctioned for […]'s strategic decision not to submit comments on […]'s net cost calculation when invited to do so by HAKOM.

993. A further criticism put forward by Claimant is that HAKOM summarily refused to accommodate […]'s request for a deferment in payment or for permission to pay the contribution in instalments, which led to the freezing of […]'s accounts and the commencement of pre-bankruptcy proceedings.

994. The Tribunal finds that Claimant's contention is not supported by the record. HAKOM's decision rejecting Claimant's request was reasoned. HAKOM noted that the establishment of a compensation fund was provided for in the 2012 PSA and had been notified to […] at least a year in advance. HAKOM took the position that […] should have better planned its finances to account for this and should have filed observations on the calculation, when prompted to do so. Finally, HAKOM concluded that […] had not demonstrated that the payment of its contribution would cause it to suffer irreparable damage, and that a stay in enforcement would endanger the universal postal service, which was in the public interest.[155] The Tribunal notes that these reasons were upheld by the High Administrative Court in Zagreb.[156]

995. Further, the Tribunal notes that, while […]'s bank accounts were frozen in order to permit the execution of HAKOM's decision, the effect of the freezing order was limited to fifteen days. On 20 March 2015, FINA's Settlement Council lifted the freezing order and allowed […] to dispose of the funds.[157]

996. On these bases, the Tribunal finds that HAKOM's refusal to accede to […]'s request for a deferral in payment or for permission to pay in instalments was reasoned and did not cause

[153] […] (Exhibit C-242).
[154] […] (Exhibit C-246).
[155] […] (Exhibit C-247).
[156] […] (Exhibit R-139).
[157] […] (Exhibit R-199).

[…] to incur lasting damage. Moreover, throughout these proceedings, […]'s due process rights were complied with.

997. For these reasons, the Tribunal concludes that Respondent's conduct with respect to the establishment of […]'s compensation fund was not arbitrary or discriminatory and did not contravene any expectations held by Claimant – regardless of whether those expectations would have been protectable under the Treaty. No breach of Article 3(1) of the Treaty on this account is therefore established.

7. Whether Respondent unlawfully excluded […] from public procurement procedures

998. After a careful analysis of the Parties' submissions and the evidence in the record, the Tribunal has concluded that Respondent breached Article 3(1) of the Treaty through its bad faith attempt to re-monopolize a part of the postal services market in the first half of 2013, after the entry into force of the 2012 PSA and the liberalization of the Croatian postal market. However, the Tribunal holds that Respondent's treatment of Claimant's investment in connection with actual public procurement procedures opened after 1 January 2013 does not amount to a violation of the FET standard.

999. The Tribunal recalls that, on 23 January 2013, following an inquiry from […], the Directorate for the Public Procurement System confirmed that the Public Procurement Act and the 2012 PSA had completely liberalized the public procurement of postal services.[158] The Directorate concluded that contracting authorities were no longer permitted to invite tenders for "universal postal services" or to require that tenderers have licenses for the provision of the universal postal service.[159]

1000. The Tribunal however observes that, when […] wrote to the Ministry of Transport in order to request clarifications as to the correct interpretation of the 2012 PSA and argued that the 2012 PSA "defin[ed] the universal postal service as an exclusive right of public interest, and exclud[ed] it from competition pursuant to its basic characteristics",[160] HAKOM and the Ministry of Transport adopted […]'s opinion almost word for word. HAKOM, which had previously been involved in the discussions with the European Commission concerning the drafting of the 2012 PSA and was therefore fully aware of its purpose to open the postal services market to competition, opined that the 2012 PSA "defin[ed] the universal service as an exclusive right of public interest" that "in some way, [had] been

[158] […] (Exhibit C-123).
[159] *Id*.
[160] […] (Exhibit C-399).

exempt from competition due to its basic features".[161] HAKOM not only purported to establish that contracting authorities were at liberty to contract for universal postal services, something which in its opinion of 5 February 2013 to […] it had acknowledged was no longer possible, but even went one step further when it opined that "the universal service, as an exclusive right, should be procured pursuant to a negotiated public procurement procedure without prior notification".[162] This opinion was adopted almost word for word by the Ministry of Transport, the principal drafter of the 2012 PSA, on 6 March 2013.[163]

1001. Respondent argues that HAKOM's and the Ministry of Transport's interpretations were not made in bad faith, but were the result of a genuine misunderstanding of the new law. The Tribunal considers that this is not supported by the record. Both institutions, in light of their involvement in the drafting of the 2012 PSA and of their extensive discussions with the European Commission, were completely cognizant of the fact that the 2012 PSA was intended to open the postal services market to competition. Both HAKOM and the Ministry of Transport, in their interpretations, opined however that the universal postal service was "exempt from competition due to its basic features" under the 2012 PSA (in the case of HAKOM) or that the 2012 PSA "defin[ed] the universal service as the public interest and in a certain manner, according to its basic features, eliminat[ed] it from the market competition" (in the case of the Ministry of Transport).[164] The Tribunal considers that such a blatant disregard for the 2012 PSA cannot be explained in the manner suggested by Respondent.

1002. The Tribunal also observes that, when […] requested that the Ministry of Transport revoke its interpretation of the 2012 PSA on account of its effect of reintroducing a monopoly on the postal services market, the Ministry of Transport refused to substantively address […]'s arguments. It was only after the European Commission intervened, forcefully challenging Respondent's interpretation as being "contrary to both the letter and spirit of the postal *acquis*" and as a "re-monopolization both in law and in practice of a specific area of universal postal services",[165] that the Ministry of Transport rescinded its restrictive interpretation of the 2012 PSA.[166]

1003. The Tribunal considers that Respondent's conduct in the first half of 2013 was arbitrary. There is no rational explanation for the Ministry of Transport's and HAKOM's attempts to re-monopolize a part of the postal services market. On account of the intended effects of

[161] […] (Exhibit C-136).
[162] *Id*.
[163] […] (Exhibit C-138).
[164] *Id*.
[165] […] (Exhibit C-147).
[166] […] (Exhibit C-157).

their interpretation and of their uncritical adoption of […]'s arguments, the Tribunal considers that Respondent's conduct can only be understood as a bad faith attempt to protect the interests of the national postal operator at the expense of its competitors.

1004. The Tribunal is satisfied that this bad faith and arbitrary conduct of Respondent's is sufficient to establish a breach of Article 3(1) of the Treaty, independently of whether Respondent was ultimately successful in its endeavors to re-monopolize a part of the postal services market or whether […] was in effect excluded from public tenders.

1005. In contrast, no finding of breach of Article 3(1) of the Treaty can be made with respect to Claimant's argument that Respondent upheld discriminatory or arbitrary tender requirements.

1006. Claimant complains that DKOM arbitrarily annulled the results of a public tender organized by the City of Koprivnica, which had awarded the contract to […], on account of […]'s professional misconduct in the provision of value-added services.[167] The Tribunal however is not persuaded that DKOM's reliance upon HAKOM's 18 May 2012 decision, a valid act pursuant to Croatian law at the time of its issuance, was arbitrary. The Tribunal has already concluded at Section VII.C.2 above that Respondent was at liberty to interpret value-added postal services cumulatively prior to its accession to the European Union. While the European Commission criticized Respondent's reliance upon this restrictive interpretation after Croatia's accession to the European Union, and pointed out that it was incompatible with the postal *acquis*,[168] the Tribunal does not consider that the European Commission's position is determinative for Claimant's claim under the Treaty. The Tribunal applies the provisions of the Treaty and international law in order to determine whether Respondent breached Article 3(1) of the Treaty.

1007. Claimant also criticizes as discriminatory DKOM's decision, dated 3 July 2013, which dismissed […]'s appeal against the results of the tender organized by […]. In that procurement procedure, […]'s bid had been disqualified on account of failing to submit a certificate from HAKOM appointing it as the universal service provider.[169] The Tribunal observes however that […]'s appeal in this case was dismissed on procedural grounds, not on the merits. DKOM concluded that […] had requested the wrong remedy and should have challenged the validity of the request for bid collection. In other words, DKOM did not review or uphold the legality of the tender requirements due to […]'s own choice of remedy.

[167] […] (Exhibit C-163).
[168] […] (Exhibit R-116).
[169] […] (Exhibit C-164).

1008. Claimant further takes exception to DKOM's decision of 5 July 2013, upholding […]'s appeal against the decision of the City of Karlovac awarding a contract to […].[170] In that procedure, DKOM invalidated the results of the tender on account of the expiration of […]'s license to provide universal postal services, a requirement that Claimant deems discriminatory. However, the Tribunal observes that the tender at issue in that case dated from October 2012 and the procurement procedure was conducted pursuant to the provisions of the 2009 PSA, not the 2012 PSA. The Tribunal notes that this transitory situation had been envisaged in Article 71 of the 2012 PSA, pursuant to which "[p]roceedings initiated pursuant to the provisions of the Postal Act … up to the date of entry into force of this Act shall be completed in compliance with the provisions of that Act and regulations adopted on the basis of that Act". Moreover, […] invoked this legal text in the procedure before DKOM. As a result, Claimant cannot now complain of the consequences stemming from the application of the 2009 PSA.

1009. In a fourth public procurement procedure deemed discriminatory by Claimant, DKOM dismissed the appeal filed by […] against the tender documents, finding that they did not favor the universal postal service provider.[171] In that proceeding, […] complained that the tender requirement to submit proof of continuous quality measurement for 2012 according to standard HRN EN 14508 was discriminatory. The Tribunal however observes that DKOM noted that the contracting authority was required under the Public Procurement Act to accept equivalent measurements of quality. In other words, […] was not held by the impossible obligation to provide the certificate of quality measurement that is specifically tailored to the provision of universal services.[172]

1010. Claimant devotes a substantial portion of its pleadings to challenge the tender requirements included in two high-value public tenders, organized by the State Office for Central Public Procurement and […] in September 2012.[173] The Tribunal notes that both public tenders contained a requirement of continuous quality measurement pursuant to the HRN EN 14508 standard. In addition, the procedure organized by the State Office for Central Public Procurement contained a requirement that tenderers have a distribution of territorial offices

[170] […] (Exhibit C-166).
[171] […] (Exhibit C-174).
[172] The Tribunal observes that […] clarified in his second witness statement that the HRN EN 14508 standard was specifically tailored to the provision of the universal service: "The HRN EN 14508 standard is specifically tailored to the provision of universal services. In fact, the designated universal service provider (i.e., […]) was required under Article 30 of the 2010 Ordinance on the Provision of the Universal Service to publish a tender for the selection of an independent body to measure the quality of its universal services in accordance with certain defined standards, including the HRN EN 14508 standard, with respect to non-priority mail items. The very same requirement was carried through in Article 31 of the 2013 Ordinance. By contrast, private postal companies were not required to measure the quality of their services; nor were they required to comply with the HRN EN 14508 standard." ([…] Second Witness Statement, at 62; internal citations omitted).
[173] […] (Exhibit C-182); […] (Exhibit C-402).

identical to the requirements of the universal postal service obligation. However, the Tribunal observes that, in both cases, […] did not submit the required bank guarantees. According to the testimony of […]:

> "As the Minutes of Public Opening of Tenders reflect, […]'s tender price inclusive of VAT was lower than […]'s by approximately HRK 30,000,000 (which is equivalent to approximately EUR 4,000,000). However, we were well aware that without the required quality certificate, […] stood no chance to prevail over […]. As I recall, we nonetheless participated in this tender to show the Central Procurement Office that we would typically charge them a lower price than […] for the provision of the same services. However, in order to avoid incurring unnecessary costs, we did not submit the bank guarantee required by the tender documentation. Had it not been for the discriminatory requirements that I discuss above, […] was well-placed to win this tender."[174] [internal citations omitted] [emphasis added]

1011. In other words, according to the testimony of Claimant's own witness, […]'s participation in these two tenders was not serious. If […] had submitted the bank guarantees and had been excluded from the tenders on the grounds mentioned above, Claimant could have challenged these discriminatory tender conditions in this arbitration. Having chosen not to do so, Claimant cannot now complain of being denied access to these lucrative public contracts.

1012. That leaves only two tenders where […] was excluded on the basis of discriminatory requirements: the tender organized by […].[175] In these tenders, […]'s bid was excluded for failure to provide evidence of continuous quality measurement as per standard HRN EN 14508 and for failure to demonstrate that its network met the density conditions for network access points provided in Article 15 of the Ordinance on the Provision of the Universal Service.

1013. The Tribunal considers that, in light of the other evidence in the record, these were isolated instances in which a breach of national law occurred. However, the Tribunal is not persuaded that […]'s exclusion from two public tenders is sufficient to establish that, after June 2013, Respondent attempted to re-monopolize a part of the postal services market in breach of the Treaty. To establish a Treaty breach, the Tribunal would have required evidence going beyond the mere showing of a breach of national law.[176]

1014. For the reasons stated above, the Tribunal finds that Respondent did not seek to re-monopolize a part of the postal services market, post-June 2013, by upholding discriminatory tender requirements. Thus, this conduct does not represent a breach of

[174] […] Second Witness Testimony, at 70.
[175] […] (Exhibit C-184).
[176] *See*, Eastern Sugar v. Czech Republic, at 272.

Article 3(1) of the Treaty, be it on the grounds of arbitrariness, of a breach of legitimate expectations or of the non-impairment obligation. However, the Tribunal maintains its conclusion that Respondent engaged in arbitrary and bad faith conduct in the first half of 2013, when HAKOM and the Ministry of Transport (unsuccessfully) attempted to restrict competition on the postal services market in order to protect the national postal company, […].

8. The failed acquisition of […]

1015. The Tribunal finds that Claimant's claim is without merit.

1016. The Tribunal agrees with Claimant that direct evidence in the record supports the conclusion that the […] transaction fell through as a result of […]'s competitive challenge to […] and […]'s subsequent refusal to approve the necessary financing. As […] reported to […] on its discussion with the […], the reasoning behind […]'s decision was "[the] worsening outlook for […] because of hostile actions of the [Croatian] Post, new law in current format, hence weak figures".[177] […] added that […] "would have approved the deal had such worsening in outlook not occurred".[178] Contrary to Respondent's contention, […] did not mention […]'s inability to meet the covenants under the Facilities Agreement. However, the bank did mention […]'s "weak figures". Significantly, this reference was made in connection with the effects of […]'s competitive challenge ("hostile actions […] hence weak figures"[179]). The Tribunal understands this to include not only the direct effect of this competitive challenge (the loss of […]), but also the indirect effect of […]'s necessary decision to reduce its prices in order to keep its clients. In its letter of 24 July 2012 to […], […] had relayed:

> "(a) on April 5th 2012, […], the second largest customer of the Company terminated the agreement for providing postal services with the Company. Termination was a result of a significantly lower pricing offered by [[…]], relying on the current provisions of the Postal Services Act authorizing universal postal services provider to offer discounts to large customers on contractual basis and avoid charging VAT on such services.
>
> The same offer was made by […] to the following other customers of the Company: […], […]. In order to avoid losing these customers, the Company lowered the prices charged to these customers and succeeded in keeping them.
>
> Enclosed to this letter please find the revised Budget for 2012."[180] [emphasis added]

[177] […] (Exhibit C-397).
[178] *Id.*
[179] *Id*.
[180] […] (Exhibit C-396).

1017. Respondent argues that other reasons also played a role in the failure of the transaction, such as business decisions taken by […] (the expansion of its network) or improper financial planning by the company. The Tribunal disagrees. No such reasons are mentioned in the email from […] or in the preceding letter from […] to […]. Had these reasons been of such capital importance as Respondent makes them out to be, undoubtedly […] would have referred to them.

1018. The Tribunal therefore finds that there is a direct causal link between […]'s competitive challenge to […] and the failure of the […] transaction. However, this is not sufficient in order to establish a breach of the Treaty. Croatian competition law, like any other competition law system, encourages price-based competition (including under certain conditions by enterprises with significant market power) as a means to achieve consumer welfare. In a similar vein, the applicable postal legislation – the 2009 PSA – likewise recognized […]'s legal right to compete with other postal services providers on the basis of price, including by offering discounts. Consequently, for Claimant's claim to succeed, it is not sufficient to establish that […] offered discounts and […] lost clients due to those discounts. It is necessary to establish that […]'s discounts were illegal, that they were contrary to the applicable Croatian Competition Act. For instance, assuming that […] had conducted itself in the same manner described at Section VII.C.3 above with respect to the disclosure of its discounts to HAKOM, but that in that scenario HAKOM had actually verified the discounts and determined that they did not bring prices below unit cost, in this situation, […] would have suffered from the normal effects of competition on the merits and the failure of the […] transaction would have been the result of normal market forces at play.

1019. In the case *sub judice*, as established at Section VII.C.3 above, HAKOM did not perform any verification of […]'s prices and discounts. However, in its 2012 Decision, the CCA looked into this matter. The CCA concluded that […] and […] were not competing on the same product market and that […]'s discounts could not have been predatory. Claimant challenges that decision as being riddled with errors. That may be true. But, as the Tribunal has already concluded at Section VII.C.4 above, the 2012 CCA Decision does not fall foul of Article 3(1) of the Treaty. The CCA complied with due process, correctly identified the relevant facts and the applicable law, and made an earnest, good faith effort to apply that law to the facts. More importantly, while the CCA made some mistakes, some of which may have been serious, those mistakes do not rise to the level of arbitrariness. Consequently, for purposes of these proceedings, the 2012 CCA Decision remains determinative and final with regard to the question of whether […] violated the Croatian Competition Act through the discounts offered in 2012.

1020. Since […]'s discounts were found by the CCA as being compliant with the Croatian Competition Act, this means that […]'s attendant loss of revenues and customers, including as a result of the failure of the […] transaction to close, was simply the normal, to be expected result of market forces at play.

1021. For these reasons, the Tribunal finds that Respondent did not breach Article 3(1) of the Treaty through unfair and arbitrary conduct that led to the failure of the […] transaction.

§

1022. For all the reasons set out above in Section VII.C, the Tribunal concludes that Respondent breached Article 3(1) of the Treaty through arbitrary conduct, which consisted of its repudiation of the *ex ante* regulatory framework that governed the provision of postal services and its attempt to re-monopolize a part of the postal services market in the first half of 2013 with a view to protecting the national postal operator.

VIII. WHETHER CROATIA BREACHED ARTICLE 6 OF THE BIT

A. Claimant's position

1023. […]

B. Respondent's position

1033. […]

C. The Tribunal's analysis

1047. Article 6 of the BIT reads:

> "Neither Contracting Party shall take any measures depriving, directly or indirectly, nationals of the other Contracting Party of their investments unless the following conditions are complied with:
>
> a) The measures are taken in the public interest and under due process of law;
>
> b) The measures are not discriminatory or contrary to any undertaking which the Contracting Party which takes such measures may have given;
>
> c) The measures are taken against just compensation."

1048. The Parties agree that Article 6 of the Treaty applies to both direct and indirect expropriations and that an expropriation claim requires evidence of a substantial deprivation of an investor's investment or, in other words, that the challenged measures must lead to an interference with property rights that is sufficiently restrictive so as to support a finding that the investment was taken from the owner.

1049. Further, the Parties are in agreement that "States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare".[181] The Tribunal likewise considers that the economic harm consequent to the non-discriminatory application of generally applicable regulations adopted in order to protect the public welfare do not constitute a compensable taking, provided that the measures were taken in good faith, complied with due process and were proportionate to the aim sought to be achieved. The Tribunal also recalls its finding at paragraph 944 above, made in the context of its analysis under the FET standard, but which is equally applicable and pertinent to the expropriation claim, that a certain level of deference is due to national agencies, tasked to regulate highly technical and specialized fields of economic activity, with regard to their assessment of whether particular forms of conduct run counter to the prescriptions of national law.[182]

1050. The Parties dispute however: (i) whether a claim for expropriation may be based upon omissions as well as actions; and (ii) whether establishing a State's intent to expropriate is a necessary pre-condition for indirect expropriation. The Tribunal agrees with Claimant, and considers it to be uncontroversial, that an expropriation claim may be based not only on positive acts of the State, but also on omissions.[183] The Tribunal does not consider it necessary to determine in the abstract whether a claim for indirect expropriation must be based on a State's intent to expropriate. For present purposes, the Tribunal considers it sufficient to note that the element of the State's intent already factors into its analysis as to whether the State legitimately and in good faith employed its police powers.

1051. After having carefully examined the facts of this case, the Tribunal has reached the conclusion that the measures challenged by Claimant, either individually or cumulatively, do not constitute a compensable taking.

[181] Saluka v. Czech Republic, at 255.
[182] *Id.*, at 272, 273.
[183] *See*, ILC Articles on State Responsibility, p. 32, Article 1, comment 1 (Exhibit CL-103).

1052. In this respect, the Tribunal notes that Claimant raises in the context of its expropriation claim the same arguments as those made in the context of its FET claim. The Tribunal has already determined in Section VII.C above that:

(i) HAKOM undertook a series of measures and implemented a number of projects in order to ensure that […] timely implemented separate cost accounting. In view of the complexity of the entire operation, its completion took several years. Claimant's contentions to the contrary are therefore factually inaccurate and cannot support its expropriation claim.

(ii) Respondent's treatment of value-added services was not arbitrary, but reasoned, applied uniformly and consistently on the market. Respondent was not under an obligation to follow the European Commission's views with respect to the interpretation of value-added services, as the obligation to incorporate the *acquis communautaire* became due only upon Respondent's accession to the European Union, on 1 July 2013. While Croatia could have been more transparent regarding its understanding of the meaning of value-added services, this does not change the conclusion that its approach was consistent and reasoned. In other words, Respondent applied Article 10(3) of the 2009 PSA, a regulation aimed at the general welfare, in good faith, in a non-discriminatory manner and in compliance with due process. For these same reasons, the Tribunal finds that Respondent's treatment of value-added services is not expropriatory.

(iii) The CCA's 2012 and 2015 Decisions, while imperfect, were issued at the close of proceedings that complied with due process, and evidenced the agency's good faith efforts to apply the correct body of law to the correct set of facts. The alleged errors included therein were within the range of errors to be expected in a regulatory and administrative context and did not show an intent to repudiate the applicable principles of competition law or a manifest failure by the CCA to discharge its mandate. The CCA's Decisions were thus issued on the basis of a regulation aimed at the general welfare (the Croatian Competition Act), in good faith, in a non-discriminatory manner and in compliance with due process. For these reasons, the Tribunal finds that the CCA's conduct was not expropriatory.

(iv) HAKOM did not deny […] timely and non-discriminatory access to […]'s postal network. Claimant's contentions to the contrary are factually inaccurate and cannot support its expropriation claim. Moreover, HAKOM and the Zagreb High Administrative Court rendered their decisions on

access on the basis of a regulation aimed at the general welfare (the 2012 PSA), in good faith, in a non-discriminatory manner and following procedures that guaranteed[…]'s due process rights. For these reasons, the Tribunal finds that the Respondent's conduct with respect to the compensation fund was not expropriatory.

(v) Respondent did not wrongfully establish a compensation fund for […], but did so on the basis of specific provisions in the 2012 PSA. Moreover, the process followed by Respondent for this purpose protected […]'s due process rights. Any errors in calculation made by HAKOM are not reviewable by this Tribunal as they were within the range of normal errors to be expected in a regulatory and administrative context. Respondent therefore applied the 2012 PSA in good faith, in a non-discriminatory manner and guaranteed due process. Respondent's conduct concerning […]'s compensation fund cannot be considered expropriatory.

(vi) Respondent did not unlawfully exclude […] from public procurement procedures through discriminatory tender requirements. Claimant's contentions to the contrary are factually inaccurate and cannot support its expropriation claim.

1053. The Tribunal has also concluded in Section VII.C.7 above that, in the first half of 2013, HAKOM and the Ministry of Transport attempted to re-monopolize a part of the postal services market through a restrictive interpretation of public procurement procedures. This conduct, while constitutive of a breach of the FET standard on account of Respondent's bad faith, did not produce any effects on the market. For this reason, the Tribunal finds that it cannot be considered to be expropriatory.

1054. The Tribunal therefore concludes that the challenged conduct above, taken individually, is not expropriatory.

1055. The Tribunal will now address the question of whether HAKOM's manifest failure to regulate […]'s prices and discounts in 2012 and 2013, in and of itself, can substantiate Claimant's expropriation claim. The Tribunal finds that it cannot.

1056. In this respect, the Tribunal recalls its observations, made in Section VII.C.8 above, pursuant to which Croatian competition law and the 2009 (and 2012) PSA encourage price-based competition as a means to achieve and enhance consumer welfare. It is only if […]'s discounts had been contrary to the Croatian Competition Act (in this instance, on the grounds of predation) that they would have been illegal and Respondent's failure to control

such discounts would have been expropriatory. In any other circumstances, even steep discounts would be a normal competitive strategy and competition on the merits, and any business losses incurred as a result could not amount to an expropriation, but only to the normal effects of market forces at play.

1057. The Tribunal has already determined that the CCA, in both its 2012 and 2015 Decisions, analyzed whether […]'s conduct in granting discounts on the postal services market was contrary to the Croatian Competition Act. In both instances, the CCA concluded, after procedures that complied with due process and following the application of the correct body of law to the correct set of facts, that it was not. While both decisions may have contained some errors in the application of the law, they do not fall foul of Article 3(1) of the Treaty and they represent a good faith exercise of Croatia's police powers. For these reasons, the Tribunal will not intervene and review the substantive correctness of the 2012 and 2015 CCA Decisions on the merits. It is only if the Tribunal had concluded that the CCA had acted capriciously, without a legitimate purpose, that it had repudiated the applicable law or had shown preference or bias, that it would have corrected the CCA's findings. Consequently, for purposes of these proceedings, the 2012 and 2015 CCA Decisions remain determinative and final with regard to the question of whether […] violated the Croatian Competition Act through the discounts offered in 2012 and 2013. Since[…]'s discounts were found by the CCA to be in line with the Croatian Competition Act,[…]'s loss of revenues and customers was simply the normal, to be expected result of competition on the merits, of market forces at play.

1058. Having concluded that the conduct challenged by Claimant, when approached from the perspective of each individual measure, is not expropriatory, the Tribunal will now determine whether, when seen cumulatively, Respondent's actions and inactions formed a composite act that was expropriatory. The Tribunal finds that they did not.

1059. The Tribunal is not satisfied, and Claimant has not convincingly established, that the series of actions and omissions above, which have been found to not be expropriatory when analyzed individually, can be considered, when examined cumulatively, to be unlawful and expropriatory.

1060. Indeed, the Tribunal finds that such a finding cannot be made in the present case. In this respect, the Tribunal notes that the crux of Claimant's expropriation claim is its submission that[…]'s predatory and unchecked discounts led to the loss of a number of clients and of significant revenue for[…], and was the key determining factor behind the failure of[…]'s business. In Claimant's submission, the other measures challenged in this arbitration aggravated these losses so that, ultimately, Claimant's entire investment was expropriated.

The Tribunal thus considers that Claimant's expropriation claim is fundamentally linked to its submission that […]'s discounts were illegal under the Croatian Competition Act.

1061. The Tribunal has concluded above that the legality of […]'s discounts was conclusively established by the CCA in its 2012 and 2015 Decisions, both of which do not run foul of Article 3(1) of the Treaty. When the Tribunal approaches Claimant's expropriation claim from the perspective of the cumulative effect of the challenged measures, it must also depart from the premise of the legality of […]'s discounts. Therefore, the most important element of Claimant's expropriation claim – […]'s illegal and unchecked discounts – must necessarily fail. The Tribunal also bears in mind its other findings above, such as the legality of HAKOM's decision establishing […]'s compensation fund and of its decision concerning […]'s value-added services. Consequently, any financial impact on […]'s business of the actions and omissions concerning […]'s discounts,[…]'s compensation fund and[…]'s value-added services cannot be sanctioned through the application of Article 6 of the Treaty. Bearing in mind the legality of […]'s discounts, the Tribunal finds that Claimant did not conclusively establish that HAKOM's abdication of its regulatory obligations, in and of itself, substantially deprived it of its investment.

1062. For all these reasons, the Tribunal finds that Respondent did not breach Article 6 of the BIT as a result of the actions and omissions challenged by Claimant in this arbitration.

IX. DAMAGES

A. Claimant's position

1063. […]

Causal link

1066. […]

Pre-expropriation period damages

1079. […]

[…] fair market value

1083. […]

Lost incremental cash flows

1089. […]

Interest

1092. […]

B. Respondent's position

1095. […]

Causal link

1096. […]

Pre-expropriation period damages

1105. […]

Post-expropriation period damages

1112. […]

Loss of opportunity damages

1115. […]

C. The Tribunal's analysis

1117. For the reasons that will be explained in more detail in the paragraphs below, the Tribunal concludes that Claimant's damages claim must be dismissed.

1118. The Tribunal has concluded at Sections VII.C.3 and VII.C.7 above that Respondent breached Article 3(1) of the Treaty through HAKOM's manifest failure to regulate […]'s prices and discounts and through HAKOM's and the Ministry of Transport's attempt, in the first half of 2013, to re-monopolize a part of the postal services market. The Tribunal has found that the remainder of Claimant's claims under Article 3(1) of the Treaty, as well as its expropriation claim, have no merit. The Tribunal's determination with respect to Claimant's claim for damages must reflect, and be informed by, these findings.

1119. The Tribunal notes that Claimant's calculation of damages is based on a finding of a Treaty breach consisting of a complex act that encompasses Respondent's treatment of value-

added services, HAKOM's and the CCA's conduct with respect to […]'s prices and discounts, HAKOM's decision regarding […]'s compensation fund and the failure of the […] transaction. Claimant did not isolate the losses allegedly stemming from these individual claims[184] but only calculated their aggregate effect. Claimant maintains that[…]'s losses were mainly due to[…]'s alleged anticompetitive discounts, but they do not distinguish, on the one hand, between the damages caused by HAKOM's conduct, and, on the other hand, the damages caused by the conduct of the CCA. As […], Claimant's damages expert, admitted at the hearing, Claimant's calculation of damages involved a cumulative assessment of the losses caused by both HAKOM's and the CCA's conduct under the rubric "anti-competitive conduct of[…]", which was the primary driver of the final calculation of damages:

> "DR ALEXANDROV: Good morning. One question. You have identified on slide 4 of your presentation the different alleged breaches. There was a discussion of your figure 17 generally starting at paragraph 97 of your first report to talk about loss of revenue due to loss of customers, then you talk about increased costs due to certain measures.
>
> My question is where do we – assuming and we have not decided anything, obviously, but when we do you will not be here -- if we, and I emphasise "if", we come to the conclusion that some but not all of those measures are breaches, where do we look? Do we look at the lost revenue and the increased cost by measure to isolate the effect of one measure versus another?
>
> […]: I will answer that. That is a fantastic question.
>
> Slide 4, obviously the size of the circles is meant to be relative so, obviously, losing the revenues due to the anti-competitive, alleged anti-competitive measures of […] is the primary issue in this case.
>
> Claimants do complain about, for example, in the upper left corner the denied access to public tenders. We do not actually calculate anything for that. It is a loss of chance, if you will. What chance they would have had is very subjective to assess but we decided to leave that out. You could consider overall damages to be quite conservative in that respect because we have not come up with that.
>
> The compensation fund payment I think you know. That is a factual matter; so not a problem.
>
> Upper right corner, acquisition of[…], we have a very specific --
>
> DR ALEXANDROV: That you have isolated, right.
>
> […]: The other two, access to the postal network and enforcement of value added postal services, extremely difficult to calculate individually.
>
> Just to give you an example, the postal services, you know, having to do the signature, to calculate that individually we would need to know and have data on how long it took a postal operator to deliver a letter, how many times he had to go to the door versus what they had to do before when they just had to drop it off without a signature and come up with a calculation.
>
> I think the effort to do that calculation probably outweighs the value of it. What we tried to do is come up with what we thought was a normalised non-type of cost structure

[184] With the exception of the A1 Direkt transaction.

> that included having to get signatures for bills but we do not have a specific calculation for those two factors."[185] [emphasis added]

1120. Claimant's calculation of damages is therefore of no use to the Tribunal in light of its finding that, with the exception of HAKOM's failure to supervise[…]'s prices and discounts, the remainder of the challenged acts and omissions mentioned herein did not breach the Treaty.

1121. The Tribunal also considers that Claimant has not succeeded in its attempt to establish a causal link between, on the one hand, HAKOM's conduct and, on the other hand, the losses allegedly incurred by[…]. As pointed out by Respondent, "Claimant [was] […] required to prove with reasonable certainty, on the basis of sufficient and cogent evidence, that Respondent actually caused[…]'s financial performance to decline, and to exclude from its damages claim losses resulting from any other likely cause".[186]

1122. The Tribunal notes in particular that[…]'s financial situation had started to deteriorate prior to HAKOM's unlawful conduct. As early as August 2011, eighteen months ahead of schedule, […] commenced its national roll-out which led to a significant increase of its costs.[187] Moreover, due to[…]'s decision to shift the full amount of the acquisition cost finance to […] in the middle of 2011,[…]'s finances were put under additional strain. In addition to the fact that Claimant has not put forward a separate calculation for the damages incurred as a result of HAKOM's conduct, the Tribunal also considers that Claimant has not adequately separated the financial effects of these strategic business decisions on[…]'s liquidity.

1123. The Tribunal also recalls that Claimant's case (including its claim for damages) is premised upon its submission that[…]'s discounts were predatory and thus in breach of the Croatian Competition Act. The Tribunal has found no breach of the Treaty as regards the conduct of the CCA. Indeed, both the 2012 and the 2015 Decisions were found to be in compliance with the standards of protection set out in the Treaty. For this reason, the Tribunal did not review the substantive correctness of the CCA's findings. Thus, the legality of[…]'s discounts was conclusively established by the CCA in its 2012 and 2015 Decisions. Since[…]'s discounts were found by the CCA to be in line with the Croatian Competition Act, HAKOM's lack of supervision thereof could only have had a limited effect on[…], whose loss of revenues and customers was simply the normal, to be expected result of competition on the merits, of market forces at play. The Tribunal reiterates that Claimant

[185] Tr., Day 9, 30: 4-25; 31-1-25; 32: 1-11.
[186] Reply, at 879.
[187] *Id.*, at 80, 81; Navigant Second Expert Report, at 85, 86.

has failed to put forward an assessment of damages specifically for the losses caused by HAKOM's conduct.

1124. Finally, the remainder of the actions and omissions challenged by Claimant in this arbitration have been found by the Tribunal to be in compliance with the provisions of the Treaty. Consequently, they cannot form the basis of an award of damages.

1125. For all these reasons, the Tribunal hereby dismisses Claimant's claim for damages.

X. COSTS

A. Claimant's position

1126. […]

B. Respondent's position

1135. […]

C. The Tribunal's analysis

1140. Article 61(2) of the ICSID Convention provides as follows:

> "In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award."

1141. Article 61(2) of the ICSID Convention grants the Tribunal significant discretion in the allocation of costs. The Parties appear to be in agreement that costs should follow the event, if there are no indications that a different solution is better suited to the case at hand. The Tribunal agrees that, to the extent possible, the allocation of costs should be done on the basis of this principle.

1142. The Tribunal has dismissed in full three out of the four jurisdictional objections raised by Respondent and granted the fourth in part. The Tribunal has also concluded that Claimant has established Respondent's liability under Article 3(1) of the Treaty on account of HAKOM's complete abdication of its duties as the postal services market regulator and of HAKOM's and the Ministry of Transport's bad faith attempt, in the first half of 2013, to re-monopolize a part of the postal services market. While Claimant has not succeeded to establish liability for any other conduct, or on the basis of Article 6 of the Treaty, and has

not put forward a calculation of damages for the conduct identified by the Tribunal to be in breach of the Treaty, the fact that the Tribunal has found that Respondent has breached the Treaty without ordering any compensation because of the absence of a proof of a causal link, constitutes a compelling reason for the Tribunal to make use of its discretion and order that Respondent bear all the costs of this arbitration and reimburse Claimant for its costs.

1143. The Tribunal notes, in this connection, that Claimant referred to an arrangement between […], which provides for a success fee in the eventuality that the Tribunal awards Claimant damages (among other conditions). Since the Tribunal has not awarded damages, there is no need to decide whether Claimant should be reimbursed for such success fee.

1144. Therefore, Respondent should reimburse Claimant the following costs for its legal representation, which the Tribunal deemes reasonable in light of the complexity of this case:

- Legal fees and expenses:[…];
- Expert fees and expenses:[…];
- Other costs: […] translation costs; […] in-house management travel expenses.

1145. The Tribunal notes that 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, amount to (in USD):

- Arbitrator fees and expenses: […];
- Tribunal assistant fees and expenses: […];
- ICSID administrative fees: […];
- Direct expenses (estimated):[188] […];
- Total: […]

1146. The above expenses have been paid out of the advances made by the Parties in equal parts.[189] As a result, each Party's share of the costs of the arbitration amounts to USD 554,616.31.

1147. Bearing in mind the considerations above, the Tribunal decides that Respondent shall reimburse Claimant the amount of USD 554,616.31 for the expended portion of Claimant's

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

advances to ICSID and EUR 3,659,607.49 to cover the costs of Claimant's legal representation.

1148. The Tribunal notes that Claimant has not requested interest on this amount, but only on any amount awarded by the Tribunal as damages.

XI. DECISION

For all the reasons developed in this Award, the Tribunal decides as follows:

(a) Finds that it does not have jurisdiction *ratione temporis* over events that took place prior to 1 April 2011;

(b) Finds that it has jurisdiction to hear Claimant's claims pertaining to events that took place subsequent to 1 April 2011;

(c) Finds that Respondent, the Republic of Croatia, breached Article 3(1) of the Treaty;

(d) Dismisses Claimant's claim that Respondent expropriated its investment;

(e) Dismisses Claimant's claim for damages;

(f) Orders Respondent to pay Claimant the amounts of USD 554,616.31 and EUR 3,659,607.49 as compensation for Claimant's costs in this arbitration;

(g) Dismisses all other claims.

[*] The page numbers in the Table of Contents of these Excerpts do not correspond to the original page numbers of the Award.

[Signed]

Dr. Stanimir Alexandrov
Arbitrator

Date: 03/04/2019

[Signed]

Prof. Brigitte Stern
Arbitrator

Date: 28/03/2019

[Signed]

Prof. Bernard Hanotiau
President of the Tribunal

Date: 03/04/2019