

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

In the arbitration proceeding between

**ACP AXOS CAPITAL GMBH**

Claimant

and

**REPUBLIC OF KOSOVO**

Respondent

**ICSID Case No. ARB/15/22**

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**AWARD**

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*Members of the Tribunal*

Philippe Pinsolle, President

Dr. Michael Feit

J. Christopher Thomas QC

*Secretary of the Tribunal*

Anna Holloway

*Date of dispatch to the Parties: May 3, 2018*

## REPRESENTATION OF THE PARTIES

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and

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*Representing the Republic of Kosovo:*

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Mr. Stephen Anway  
Mr. Mark Stadnyk  
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United States of America

and

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and

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**TABLE OF ABBREVIATIONS**

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
Axos	ACP Axos Capital GmbH
BIT or Treaty	Treaty Between the Federal Republic of Germany and the Socialist Federal Republic of Yugoslavia Concerning the Reciprocal Protection and Encouragement of Investments
BT	BT Sp Zoo
Claimant	ACP Axos Capital GmbH
Claimant's Memorial	Claimant's Memorial on the Merits and Quantum dated 24 June 2016
Claimant's Rejoinder	Claimant's Rejoinder on Jurisdiction and Admissibility dated 29 September 2017
Claimant's Reply	Claimant's Reply on the Merits and Quantum and Counter-Memorial on Jurisdiction and Admissibility dated 16 June 2017
CL-[#]	Claimant's Legal Authority
Columbia	Columbia Capital V LLC
Exhibit C-[#]	Claimant's Exhibit
Exhibit R-[#]	Respondent's Exhibit
GPC	Government Privatization Committee of the Republic of Kosovo

Hearing	Hearing on jurisdiction, merits and quantum held from 6 November 2017 to 13 November 2017
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated March 18, 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
IPQ	Instructions for Pre-Qualification
ITP	Instructions for Tender Participants (Exhibit C-7)
Kosovo	Republic of Kosovo
Law on PoEs	Law No. 03/L-087 on Publicly Owned Enterprises
Law on PPP	Law No. 04/L-045 on Public-Private-Partnership
PoEs	Publicly Owned Enterprises
PIU	Project Implementation Unit
PPP	Public-Private-Partnership
PTK	Post and Telecommunications of Kosovo J.S.C.
Respondent	Republic of Kosovo
Respondent's Counter-Memorial	Respondent's Counter-Memorial (Corrected Version) dated 23 December 2016

Respondent's Rejoinder	Respondent's Rejoinder on the Merits and Quantum and Reply on Jurisdiction and Admissibility dated 1 September 2017
RL-[#]	Respondent's Legal Authority
SHA	Shareholder Agreement
SPA	Share Purchase Agreement
Tr. Day [#] [Speaker(s)] [page:line]	Transcript of the Hearing
Transaction Advisors	Lazard Frères SAS and Raiffeisen Investment AG
Tribunal	Arbitral tribunal constituted on 3 December 2015

## **I. INTRODUCTION**

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”) on the basis of the Treaty between the Federal Republic of Germany and the Socialist Republic of Yugoslavia concerning the Reciprocal Protection and Encouragement of Investments, which entered into force on 25 October 1990 (the “BIT” or “Treaty”) and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on October 14, 1966 (the “ICSID Convention”).

### **A. The Parties<sup>1</sup>**

#### 1. The Claimant

2. The Claimant is ACP Axos Capital GmbH (“Axos”), a company incorporated under the laws of Germany. Its address is:

ACP Axos Capital GmbH  
Magdalenenstrasse 5  
D-20148 Hamburg  
Germany

3. In this arbitration, Axos is represented by:

Dr. Dirk Hamann  
Dr. Patricia Nacimiento  
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<sup>1</sup> Capitalized terms have the meaning ascribed to them in the Parties’ submissions or the relevant underlying documents found in the record.

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2. The Respondent

4. The Respondent is the Republic of Kosovo (“Kosovo”).
5. In this arbitration, the Republic of Kosovo is represented by:

Mr. Luka S. Misetic  
Mr. Stephen Anway  
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**B. Arbitration Clause and Governing Law**

6. Article 9 of the Treaty concerning the reciprocal protection and encouragement of investments entered into between the Federal Republic of Germany and Yugoslavia provides as follows:

*Article 9*

*(1) Differences of opinion regarding investments between either Contracting Party and an investor of the other Contracting Party shall, as far as possible, be settled amicably between the parties to the dispute.*

*(2) If a difference of opinion cannot be settled within six months from the time of its assertion by either of the parties to the dispute, it shall upon the request of the investor of the other Contracting Party be submitted for arbitration within the scope of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965.*

*(3) The arbitration award shall be binding and shall not be subject to appeal or any legal redress other than those provided for in the Convention mentioned above. The arbitration award shall be enforced under national law.*

*(4) The Contracting Party which is party to the dispute shall not, at any stage of the arbitration proceedings or enforcement of an award, raise as an objection the fact that the investor of the other Contracting Party has received in pursuance of an insurance policy an indemnity in respect of some or all of the losses.<sup>2</sup>*

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<sup>2</sup> The original text of the Treaty is in German and Serbo-Croatian. For ease of reference, this Award refers to the United Nations' translation to English, as published in the United Nations Treaty Series, Vol. 1707, I-29533, pages 605-612, **Exhibit C-1**. The Treaty was ratified by Kosovo on 2 September 2011 and by the Federal Republic of Germany on 10 June 2011, **Exhibit C-1**.

### **C. Procedural Language and Place of the Proceedings**

7. The procedural language of the arbitration is English,<sup>3</sup> and the place of the proceeding is Paris, France.<sup>4</sup>

## **II. PROCEDURAL HISTORY**

### **A. Commencement of the Proceedings**

8. Axos' Request for Arbitration was submitted to ICSID on 22 April 2015. The Request was supplemented by three further letters from the Claimant, of 22 May 2017, 27 May 2017 and 3 June 2015.
9. On 4 June 2015, the Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration.
10. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings. The Parties agreed to constitute the Tribunal in accordance with Article 37(2)(a) of the ICSID Convention as follows: the Tribunal would consist of three arbitrators, one to be appointed by each Party and the third, presiding arbitrator to be appointed by agreement of the Parties or, in the absence of such agreement, by the Secretary-General of ICSID pursuant to an agreed ballot procedure.
11. On 18 September 2015, Arbitrator Dr. Michael Feit, a national of Switzerland and Israel, appointed by the Claimant, issued his declaration of independence.
12. On 23 September 2015, Arbitrator J. Christopher Thomas QC, a national of Canada, appointed by the Respondent, issued his declaration of independence.
13. On 3 December 2015, the ICSID Secretariat informed the Parties that Mr. Philippe Pinsolle, a national of Switzerland and France, President, appointed by the Secretary-General pursuant to the agreement of the Parties, as well as Dr. Michael Feit and Mr. J. Christopher Thomas QC had all

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<sup>3</sup> Procedural Order No. 1, ¶ 11.1.

<sup>4</sup> Procedural Order No. 1, ¶ 10.1.

accepted their appointments as arbitrators in the case. The Tribunal was constituted as of 3 December 2015, pursuant to Article 38(2)(a) of the ICSID Convention and Arbitration Rule 6. Ms. Celeste Mowatt, Legal Associate, ICSID, was designated to serve as Secretary of the Tribunal.

**B. First Session of the Tribunal and Issuance of Procedural Order No. 1**

14. The first session of the Tribunal was held on 1 February 2016 by telephone conference, in accordance with Arbitration Rule 13(1).
15. Following this session, on 10 February 2016 the Tribunal issued Procedural Order No. 1 setting out the Procedural Rules governing the arbitration as well as a timetable of the proceedings.
16. On 18 August 2016, the timetable set forth in Procedural Order No. 1 was amended.
17. On 17 October 2016, Mr. Pinsolle informed the Parties that Ms. Isabelle Michou, previously a partner at Herbert Smith Freehills and counsel of record for Axos in this arbitration, had joined the partnership of Quinn Emanuel where Mr. Pinsolle is also a partner. Mr. Pinsolle stated that this did not affect his independence or impartiality towards the Parties and asked for the Parties' comments on this disclosure. On 24 October 2017, each Party confirmed that it did not object to Mr. Pinsolle continuing to serve in this arbitration.

**C. Written Pleadings, Document Production and Course of the Arbitration**

18. On 24 June 2016, Axos sent the Tribunal its Memorial on Merits and Quantum and hyperlinked indexes of factual and legal exhibits. The Memorial on Merits and Quantum was accompanied by three factual witness statements: the witness statement of Mr. Jan Budden, dated 24 June 2016, the witness statement of Mr. Robert Woog, dated 23 June 2016, and the witness statement of Mr. Andrew Bullock, dated 17 June 2016; and two expert reports: the expert report of FTI Consulting, dated 24 June 2016, and the expert report of Dr. Nina Plavšak, dated 23 June 2016.
19. On 23 December 2016, Kosovo submitted its Counter-Memorial and hyperlinked indexes of factual and legal exhibits. The Counter-Memorial was accompanied by a factual witness statement, the witness statement of Mr. Besim Beqaj, dated 22 December 2016; and two expert reports, the expert report of Professor Qerim Qerimi, dated 22 December 2016, and the expert report of KPMG (Mr. Michael Peer), dated 23 December 2016.

20. On 16 January 2017, Kosovo submitted a corrected version of its Counter-Memorial, rectifying minor typographical errors and citations. The Respondent submitted a clean and a redline version of the Counter-Memorial in order to show the changes made. The Respondent sent a letter with its rectified Counter-Memorial explaining the changes made on the same date.
21. On 13 February 2017, the Parties exchanged documents by way of voluntary production.
22. On 23 February 2017 the Parties submitted their respective Redfern Schedules containing their requests for production of documents. Axos further enclosed a letter with its request in which it responded to some of Kosovo's objections and made a number of observations in relation to its own application.
23. On 23 February 2017, the Tribunal acknowledged receipt of Axos' Redfern Schedule and Kosovo's Redfern Schedule and stated that it would render its decision by 6 March 2017.
24. On 6 March 2017, the Tribunal issued Procedural Order No. 2 containing its decision on the Redfern Schedules and the production of documents.
25. Following this, Axos sent a letter to the Tribunal dated 14 June 2017, attaching correspondence between the Parties dated 23 May 2017 and 2 June 2017. In this letter, Axos sought clarification from the Tribunal regarding the proper scope of Procedural Order No. 2, in particular, relating to privilege and commercial confidentiality. As Axos was at the time preparing its Reply Memorial, it requested that it be permitted to make limited additional submissions to take account of any further documents arising from an order of disclosure of further documents.
26. On 16 June 2017, Axos submitted its Reply on Merits and Quantum and Counter-Memorial on Jurisdiction and Admissibility and hyperlinked indexes of factual and legal exhibits. The Reply on Merits and Quantum and Counter-Memorial on Jurisdiction and Admissibility were accompanied by hyperlinked indexes of factual and legal exhibits; two factual witness statements, a second witness statement of Mr. Jan Budden, dated 15 June 2017, and the witness statement of Mr. Dixon Doll, dated 12 June 2017; as well as two expert reports, a second expert report prepared by Dr. Nina Plavšak, dated 19 May 2017, and a second expert report prepared by FTI Consulting, dated 16 June 2017.

27. Kosovo replied to Axos' letter of 14 June 2017 on 21 June 2017, attaching two appendices, addressing the points raised by Axos in its letter. Kosovo requested that the Tribunal reject Axos' allegations of breaches of the Tribunal's Order in the document production phase of the arbitration.
28. Axos then sent a letter dated 28 June 2017 whereby it repeated its positions stated in its letter of 14 June 2017.
29. Kosovo sent an email on 1 July 2017 indicating that it maintained the position stated in its letters of 2 June 2017 and 21 June 2017 and noting that it had nothing further to add.
30. On 5 July 2017, the Tribunal issued Procedural Order No. 3 deciding on outstanding issues related to document production.
31. On 10 July 2017, Kosovo wrote to the Tribunal in reply to Procedural Order No. 3 and confirmed that it *"has not withheld correspondence solely on the basis that it was copied to counsel of Respondent and that all document withheld contained request for or the giving of legal advice."* Kosovo further confirmed that it had no further documents to produce.
32. On 1 September 2017, Kosovo submitted its Rejoinder on Merits and Quantum and its Reply on Jurisdiction and Admissibility. The Rejoinder and the Reply were accompanied by a second expert report of KPMG (Mr. Michael Peer), dated 1 September 2017, as well as a second expert report of Professor Qerim Qerimi as a commentary of the second expert report of Dr. Nina Plavšak, dated 19 May 2017. The Respondent also submitted a witness statement of Mr. Kreshnik Gashi, a witness statement of Mr. Fadil Ismajli, and a second witness statement of Mr. Besim Beqaj, all dated 31 August 2017.
33. On 5 September 2017, the Secretary-General of ICSID informed the Tribunal that Ms. Anna Holloway would serve as Secretary of the Tribunal effective immediately in replacement of Ms. Celeste Mowatt.
34. On 29 September 2017, the Claimant submitted its Rejoinder on Jurisdiction and Admissibility in response to the Respondent's Rejoinder on Merits and Quantum and Reply on Jurisdiction and Admissibility. The Rejoinder on Jurisdiction and Admissibility was accompanied by a third expert

report prepared by Dr. Nina Plavšak to provide her opinion on the points raised in Professor Qerim Qerimi's second report of 31 August 2017.

**D. Hearing**

35. On 3 October 2017, the President of the Tribunal and the Parties held a telephone conference to discuss the organization of the forthcoming hearing on jurisdiction and merits (the "Hearing").
36. Prior to the call, on 18 September 2017, a draft agenda was circulated to the Parties, who were invited to confer and submit a joint proposal advising the Tribunal of any agreements they had been able to reach on any of the agenda items, or of their respective positions where they had been unable to reach an agreement.
37. By the same letter, the Parties were also invited to agree to notify each other, and the Tribunal, by 29 September 2017, regarding the witnesses each wished to call for cross-examination at the Hearing. The Parties confirmed their agreement to this proposal on 22 September 2017.
38. On 28 September 2017, in accordance with the Tribunal's directions, the Parties jointly submitted a "Summary of Parties' Positions."
39. On 29 September 2017, each Party notified the other Party and the Tribunal of the witnesses they intended to cross-examine at the Hearing.
40. On 6 October 2017, the Tribunal issued Procedural Order No. 4 deciding on the organization of the Hearing, namely the location, the schedule, the allocation of time, the attendance, the witness and expert examination, the documentation and hearing materials, the post-hearing briefs and statements of costs/submissions on costs, and the hearing logistics.
41. The Hearing was held in Paris from 6 November 2017 to 13 November 2017. The following persons were present at the Hearing:

*Tribunal:*

Mr. Philippe Pinsolle	President
Dr. Michael Feit	Arbitrator
Mr. J. Christopher Thomas, QC	Arbitrator

*ICSID Secretariat:*

Ms. Anna Holloway Secretary of the Tribunal

*For the Claimant:*

Mr. Andrew Cannon	Herbert Smith Freehills LLP
Ms. Patricia Nacimiento	Herbert Smith Freehills LLP
Mr. Dirk Hamman	Herbert Smith Freehills LLP
Mr. Peter Archer	Herbert Smith Freehills LLP
Ms. Rosalind Axbey	Herbert Smith Freehills LLP
Mr. Alessandro Covi	Herbert Smith Freehills LLP
Mr. Jerome Temme	Herbert Smith Freehills LLP
Mr. Arjun Doshi	Herbert Smith Freehills LLP
Mr. Jan Budden (also a witness)	ACP Axos Capital GmbH
Dr. Ulrich Hammerschmidt	ACP Axos Capital GmbH

*For the Respondent:*

Mr. Luka S. Misetić	Squire Patton Boggs
Mr. Stephen P. Anway	Squire Patton Boggs
Mr. Rostislav Pekar	Squire Patton Boggs
Mr. Stephan Adell	Squire Patton Boggs
Mr. Mark Stadnyk	Squire Patton Boggs
Mr. Vladimir Polach	Squire Patton Boggs
Ms. Fazile Bekteshi	Ministry of Economic Development of Kosovo
Ms. Marcelë Restelica Ponosheci	Ministry of Economic Development of Kosovo
Ms. Leonita Shabani Mullarama	Ministry of Economic Development of Kosovo
Mr. Heset Mazrekaj	Ministry of Justice of Kosovo

*Court Reporters:*

Ms. Anne-Marie Stallard	The Court Reporter LLC
Ms. Kirsten Bell	The Court Reporter LLC

42. During the Hearing, the following persons were examined:

*On behalf of the Claimant:*

Mr. Jan Budden	ACP Axos Capital GmbH
Mr. Robert Woog	
Mr. Dixon Doll	
Dr. Nina Plavšak	
Mr. James Nicholson	FTI Consulting
Mr. Richard Edwards	FTI Consulting

*On behalf of the Respondent:*

Mr. Besim Beqaj	Minister of Innovations and Entrepreneurship of Kosovo
Mr. Kreshnik Gashi	Chairmen of the Regulatory Authority of Electronic and Postal Communications of Kosovo
Mr. Fadil Ismajli	Former Minister of Economic Development of Kosovo
Professor Dr. Qerim Qerimi	University of Prishtina
Mr. Michael Peer	KPMG

43. The Parties filed their submissions on costs on 12 December 2017, and observations on the other Party's statement of costs on 20 December 2017.
44. The proceeding was closed on 4 April 2018.

### **III. DECISION ON JURISDICTION AND ADMISSIBILITY**

#### **A. The Parties' Respective Prayers for Relief**

45. Axos' prayer for relief contained in its last pleading, i.e., the Rejoinder on Jurisdiction and Admissibility, dated 29 September 2017, requests the Tribunal to:

- a. reject the Respondent's jurisdictional objections in their entirety;*
- b. declare that it has jurisdiction over the present dispute, including all of the Claimant's claims under the BIT;*
- c. grant the relief sought by the Claimant on the merits of its claims;*
- d. order that the Respondent pay the cost of these arbitration proceedings, including the fees and expenses of the Tribunal, as well as legal and other expenses incurred by the Claimant, including the fees of its legal counsel, experts and consultants, plus interest thereon at a reasonable rate from the date on which such costs are incurred to the date of payment; and*
- e. grant such other relief as the Tribunal may deem just and proper.*

46. The "relief sought [...] on the merits" of Axos' claims is stated in full in Axos' Reply Memorial, dated 16 June 2017:

- a. a declaration that the Respondent has breached Article 4(2) of the BIT by expropriating the Claimant's investment;*
- b. a declaration that the Respondent has breached Article 2(1) of the BIT by failing to accord fair and equitable treatment to the Claimant's investment;*
- c. a declaration that the Respondent has breached Article 2(3) of the BIT by taking arbitrary measures that have prejudiced the Claimant's use of its investment;*
- d. a declaration that the Respondent has breached Article 7(2) of the BIT by failing to observe obligations entered into with regard to the Claimant's investments;*



*e. an order that the Respondent make full reparation for the Claimant's loss arising out of the Respondent's treaty violations, in the amount of €380.3 million, as well as interest thereon;*

*f. an order that the Respondent pay the cost of these arbitration proceedings, including the fees and expenses of the Tribunal, as well as legal and other expenses incurred by the Claimant, including the fees of its legal counsel, experts and consultants, plus interest thereon at a reasonable rate from the date on which such costs are incurred to the date of payment; and*

*g. such other relief as the Tribunal may deem just and proper.*

47. On 5 November 2017, Axos noted that FTI Consulting intended to update its table dealing with Axos' asserted lost profit. The revised figures in the updated table quantified Axos' asserted lost profit under the Reduced Profitability Scenario at the amount of EUR 194.3 million and under the Maintained Profitability Scenario at the amount of EUR 339.8 million. These figures appeared to reduce the quantum of Axos' claim for full reparation.

48. Pursuant to Kosovo's Counter-Memorial, dated 23 December 2017, and Rejoinder on Merits and Quantum and Reply on Jurisdiction and Admissibility, dated 1 September 2017, Kosovo seeks for its part a Final Award:

*(a) declaring that the Tribunal does not have jurisdiction;*

*(b) alternatively, dismissing Axos' claims;*

*(c) awarding Kosovo such other relief as the Tribunal considers appropriate; and*

*(d) ordering Axos to pay the costs of this arbitration, including the costs of the Arbitral Tribunal and the legal and other costs incurred by Kosovo on a full indemnity basis, plus interest in an amount to be determined by the Tribunal.*

## **B. Principal Facts**

49. For the sake of clarity, the Tribunal will first provide a brief account of the facts of this case. This account is not intended to be exhaustive. It serves merely as a guide for the reader. To the extent that certain specific facts are relevant for the claims made by either side, they will be discussed in the analysis of the claim in question.

1. The Decision to Privatize PTK

50. Following the declaration of independence of Kosovo in 2008, the Government of Kosovo decided in early 2011 to offer for tender and sale 75% of the shares of Post and Telecom of Kosovo (“PTK”), the postal and communication authority of Kosovo.
51. To that effect, on 9 March 2011, the Government of Kosovo issued Decision No. 02/03 to offer for tender and sale 75% of the shares of PTK and granting authority to the Government Privatization Committee (“GPC”) to conduct the tender and sale of the shares:

*DECISION*

- 1. To offer for tender and sale 75% (seventy five percent) of the shares of the publicly Owned Enterprise PTK J.S.C.*
- 2. To establish the Government Privatization Committee (GPC) for the privatization of PTK J.S.C. [...]*
- 3. The Government Privatization Committee (GPC) should follow an open, transparent and competitive procedure in accordance with the procedural conditions set out in the laws of the Republic of Kosovo and by the highest international standards.*

[...].<sup>5</sup>

52. This decision was subsequently approved by the Assembly of Kosovo on 31 March 2011,<sup>6</sup> and Kosovo appointed financial advisories Lazard Frères SAS and Raiffeisen Investment AG to act as transaction advisors for the privatization process in early 2012 (the “Transaction Advisors”).<sup>7</sup>

2. The Tender Process

53. The tender process started in April 2012,<sup>8</sup> and a first conference for potential investors was organized by the Transaction Advisors in London on 22 May 2012.<sup>9</sup> Another conference for

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<sup>5</sup> Exhibit C-59.

<sup>6</sup> Exhibit C-4.

<sup>7</sup> Exhibit R-10.

<sup>8</sup> Exhibit R-1.

<sup>9</sup> Exhibits R-2, R-14.

potential investors was organized one week later, on 29 May 2012, in Istanbul.<sup>10</sup> Claimant was among the 20+ potential investors who participated in those conferences.<sup>11</sup>

54. The following month, Kosovo formally announced a public invitation for participation in the public tender process for the shares in PTK and issued the Instructions for Pre-Qualification (“IPQ”). The IPQ is the document containing the instructions issued by Kosovo, notably:

- describing the contemplated transaction (Section 3);
- stating the pre-qualification requirements for potential bidders (Section 4);
- describing the consortium structure to be adopted by potential bidders (Section 5);
- describing the form and content of applications for pre-qualification and manner in which such applications should be submitted (Sections 6 and 7); and
- describing the evaluation process for such applications (Section 8).<sup>12</sup>

55. Shortly thereafter, on 17 July 2012, Axos was incorporated under the laws of the Federal Republic of Germany, with Mr. Jan Budden as sole managing director.<sup>13</sup>

56. A number of potential bidders submitted pre-qualification applications pursuant to the IPQ, and on 15 August 2012, the Transaction Advisors prepared a 30-page pre-qualification report evaluating eight investors’ applications for pre-qualification submitted up to 13 August 2012.<sup>14</sup> Among those potential investors was a consortium comprising Columbia Capital V LLC (“Columbia”), acting as lead member, and Axos.

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<sup>10</sup> Exhibits R-3, R-14.

<sup>11</sup> Exhibits R-2, R-3, R-14; Respondent’s Counter-Memorial, ¶ 26.

<sup>12</sup> Exhibit C-5.

<sup>13</sup> Exhibit C-2.

<sup>14</sup> Exhibit R-4.

57. The report found Columbia and Axos' application compliant with the IPQ,<sup>15</sup> and on that basis, the GPC announced on 17 August 2012 a list of five pre-qualified applicants, including the Columbia/Axos Consortium. That announcement stated:

*1.2. Pre-qualified Applicants*

*On August 17, 2012 the Contracting Authority announced 5 Economic Operators as Pre-Qualified Applicants in accordance with the IPQ. On September 11, 2012 the Contracting Authority invited the Pre-Qualified Applicants to start the Tender process.*

*List of Pre-qualified Applicants:*

- *Albright Capital Management, LLC, USA*
- *Columbia Capital V, LLC, USA (in consortium with AP Axos, Germany)*
- *M 1 International, British Virgin Island*
- *Turkcell, Turkey*
- *Twelve Hornbeams, UK (in consortium with Avicenna, UK).<sup>16</sup>*

58. The pre-qualification was notified to the Columbia/Axos Consortium by letter on that same date:

*Title: Public tender for the privatisation of 75% (seventy five percent) of shares of Publicly Owned Enterprise Post and Telecommunications of Kosovo J.S.C. PTK J.S.C.*

*[...]*

*Your prequalification application has been thoroughly evaluated according to the conditions given in the Instructions for Pre-Qualification (IPQ) document which was issued based on the aforementioned laws.*

*We have the pleasure to inform you that your company/application has prequalified and we will invite you in for the second phase of this tender after all the required processes are finalised.<sup>17</sup>*

59. The second phase of the tender process began on 11 September 2012, when the pre-qualified applicants were each provided with the Instructions for Tender Participants ("ITP"), along with a

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<sup>15</sup> Exhibit R-4, p. 8.

<sup>16</sup> Exhibit C-7, Section 1.2.

<sup>17</sup> Exhibit C-6.

tender dossier comprised of an Information Memorandum and draft Transaction Documents, including a draft Share Purchase Agreement (“SPA”), draft Shareholder Agreement (“SHA”), and draft Escrow Agreement.<sup>18</sup>

60. The ITP notably contained provisions relating to:

- a tentative time schedule for the deal (Section 2);
- data room, due diligence, questions and clarifications (Sections 4 and 10);
- the Bid Submission Deadlines and Submission Requirements (Section 5);
- the form and content of the Bid (Section 6);
- the requirements of and rules for the applicant consortia (Sections 3 and 7); and
- evaluation criteria and procedure (Sections 8 and 9).<sup>19</sup>

61. With respect to the draft Transaction Documents, the ITP provided in particular for very limited comments on the part of a tender participant, with Kosovo retaining the last word on accepting or rejecting any proposed amendment to the draft documents:

*6.6. Amendments to the Transaction Documents*

*There will be no negotiations of Transaction Documents in this Tender. Pre-Qualified Tender Participants shall submit their suggested amendments to the Transaction Document drafts provided together with this ITP until 08 October 2012. Pre-Qualified Tender Participants are requested to keep their proposed amendments to a minimum. Any change to the Transaction Documents requires the approval of the GPC.*

*The amendments to the Transaction Documents by the Pre-Qualified Tender Participants shall also include input to any items indicated as being subject to input from Pre-Qualified Tender Participants. For example, the Pre-Qualified Tender Participants shall submit their proposal of an escrow bank and shall facilitate contacts to such escrow bank in order to have the escrow bank agree to the escrow agreement as set out in the Transaction Documents.*

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<sup>18</sup> Exhibit C-7.

<sup>19</sup> Exhibit C-7.

[...] *General comments will not be taken into account, unless such comments are accompanied with a wording proposal. The amendments shall be made in such a form that by simply accepting the amendments, the respective document can be signed without changing the non-amended parts of the document.*

*The Transaction Advisor will organise a joint session (in the form of a physical meeting or a telephone conference) with each Pre-Qualified Tender Participant, in which the Pre-Qualified Tender Participant may explain the reasons for its proposed amendments. This will not be a negotiation, and the Transaction Adviser will not comment save where it requires clarification of any proposed amendment.*

*The GPC may in its sole discretion take into account the Pre-Qualified Tender Participants' proposed amendments and may in its sole discretion accept or reject all or a part of the comments of the Pre-Qualified Tender Participant.*

*The Transaction Advisor will issue a final set of Transaction Documents prior to the Bid Submission Deadline. This final version of the Transaction Documents shall be considered as final and shall form the basis on which the Bidder shall make his Bid and shall constitute the version of the Transaction Documents which will be signed by the Bidder (the "Final Transaction Documents").*

[...].<sup>20</sup>

62. The ITP also contained a broadly worded legal disclaimer which provided in express terms that no compensation shall be due in the event of cancellation of the privatization:

*The Contracting Authority further reserves the right to cancel the Tender or declare it void or otherwise without effect either in relation to the entire Tender or in relation to an individual Bidder, for any reason whatsoever, until the signing of the Transaction Documents, and that such action does not entitle the Bidder/Selected Bidder to any claim whatsoever against the GPC, the GoK, or any of their respective agents, representatives, advisors or consultants.*<sup>21</sup>

63. The ITP provided in addition a specific liability regime of joint and several liability for the members of the winning consortium which would continue to apply in the event that the successful bidder should decide to incorporate a special purpose vehicle for the purpose of carrying out the proposed transaction:

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<sup>20</sup> Exhibit C-7, Section 6.6.

<sup>21</sup> Exhibit C-7, Section 1.1 *in fine*.

## 6. 7. Special Purpose Company

*In the event that a Selected Bidder forms a Special Purpose Company to enter into the Transaction Documents, the Selected Bidder (and, in case of a Consortium, all members of the Consortium) shall remain jointly and severally liable with the Special Purpose Company for any liabilities incurred under the Transaction Documents and such relationship and liability shall be proven to the Contracting Authority by co-signing of the Transaction Documents by the Bidder.*

*The Special Purpose Company needs to be registered in a country that recognizes Kosovo.*<sup>22</sup>

64. The law applicable to the ITP was the law of the Republic of Kosovo:

*These ITP and any disputes or claims arising out of or in connection with its subject matter (including noncontractual disputes or claims) are governed by and construed in accordance with the law of the Republic of Kosovo.*<sup>23</sup>

65. On 12 September 2012, Axos entered into a framework agreement for Business Consultancy Services with BT Sp Zoo (“BT”).<sup>24</sup> The scope of services, as described in Schedule 1 of the framework agreement, was for BT to “*review and assess quality, capital requirements and potential operational improvements in Client’s target’s network [i.e. PTK].*” The BT Project Representative was Mr. Andrew Bullock.<sup>25</sup>
66. The due diligence process continued for some time and, on 29 October 2012, counsel for Axos circulated mark-ups of the SPA, SHA, and Escrow Agreement to the Transaction Advisors.<sup>26</sup>
67. After a meeting of the Project Implementation Unit (“PIU”) of Kosovo, the Transaction Advisors, and certain prospective bidders, including Axos, held negotiation meetings on 8-10 November 2012 in Vienna.<sup>27</sup> Axos then circulated a mark-up of the ITP to the Transaction Advisors on 21 November 2012.<sup>28</sup>

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<sup>22</sup> Exhibit C-7, Section 6.7.

<sup>23</sup> Exhibit C-7, Section 13.5.

<sup>24</sup> Exhibit C-73.

<sup>25</sup> Exhibit C-73; Schedule 1.

<sup>26</sup> Exhibit C-79.

<sup>27</sup> Exhibit C-80.

<sup>28</sup> Exhibit R-57.

68. Axos' view at the time was that, should Kosovo accept the proposed changes to the Transaction Documents, as circulated by counsel to Axos on 29 October 2012, those changes should be reflected in the ITP, and an amended ITP should be issued. As it noted in its cover email to the Transaction Advisors of 21 November 2012:

*We are referring to the mark ups on the transaction documents submitted on 29th of October and the meeting for discussion of the mark ups held in Vienna on 8th of November.*

*Please note that, subject to acceptance of the substantial elements of our mark ups, we reasonably conclude that the ITP document should suffer adequate changes too. Therefore, please find attached changes of the ITP reflecting possible acceptance of substantial elements from our mark ups. Please note also that the authorities, should they decide to accept the substance of our mark ups, would have to issue another decision for amending the part of the IPQ reflecting changes of relevant dates for undertaking procedural actions.<sup>29</sup>*

69. Axos' mark-up of the ITP called, in particular, for amendments to:

- the legal Disclaimer of Section 1.1, suggesting that language be added to the effect that Kosovo “*shall provide cost compensation in case privatization is terminated or not finalized for unpredictable Kosovo internal political reasons*”; and
- the liability regime attaching to a bidder should they set up a Special Purpose Company to enter into the Transaction Documents, effectively eliminating such liability (Section 6.7). The proposed amendment read: “*In the event that a Selected Bidder forms a Special Purpose Company to enter into the Transaction Documents, the Selected Bidder (and, in case of a Consortium, all members of the Consortium) shall choose to issue statement declaring not to be y [sic] liable with the Special Purpose Company for any liabilities incurred under the Transaction Documents. In such case the Contracting Authority will have right to ask special performance guarantees from the Special Purpose Company or extension of validity of the Completion Security for maximum duration of 5 years*” (emphasis added).

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<sup>29</sup> Exhibit R-57.



70. Following discussions with the various prospective bidders, on 28 November 2012 Kosovo issued Amendment No. 1 to the ITP, extending the bid submission deadline from 19 November 2012 to 15 January 2013.<sup>30</sup>
71. On 11 December 2012, Axos entered into a framework agreement for Business Consultancy Services with Telecom Italia.<sup>31</sup> Although the Form of Statement of Work was not filled out in the agreement,<sup>32</sup> the Tribunal understands from Axos' pleadings that the intent was, *inter alia*, to introduce 3G and 4G products developed by Telecom Italia (as well as by BT) on a "white label" basis.<sup>33</sup>
72. Further to the discussions with prospective bidders, the Transaction Advisors circulated amended drafts of the Transaction Documents on 18 December 2012.<sup>34</sup> On the same date, Kosovo issued Amendment No. 2 to the ITP amending various sections of the ITP, including:
- the Signing Date (Section 5.4);
  - the Rules of Consortia (Section 7); and
  - The Bid Submission Form (Annex 1).<sup>35</sup>
73. Neither the legal disclaimer (Section 1.1) nor the liability regime for special purpose companies (Section 6.7) was however modified.
74. On 27 December 2012, Columbia (which had up to that point been the lead member of the Consortium) by email informed the GPC and the Transaction Advisors of changes in the consortium structure, including most notably its withdrawal from the Consortium:

*We are hereby informing you that there is a change in our consortium structure.*

*The new structure is as follows:*

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<sup>30</sup> Exhibit C-83.

<sup>31</sup> Exhibit C-85.

<sup>32</sup> Exhibit C-85, Schedule 1.

<sup>33</sup> Claimant's Memorial, ¶ 518.

<sup>34</sup> Exhibit C-88.

<sup>35</sup> Exhibit C-87.

*ACP AXOS CAPITAL GMBH, Hamburg Germany shall become a Lead Member of our consortium, and*

*NAJAFI COMPANIES, LLC shall enter as a new member of the consortium.*

*COLUMBIA CAPITAL V, LLC shall no longer be part of the consortium.*

*TELEKOM ITALIA joins next to British Telecom as a strategic partner.*

*We have attached the relevant documentation for your consideration and are happy to address any questions you might have at your convenience.*<sup>36</sup>

75. A few days after Columbia's withdrawal from the Consortium, on 7 January 2013, Axos circulated new mark-ups of the draft SHA, SPA, and Escrow Agreement.<sup>37</sup>
76. On 30 January 2013, Kosovo issued Amendment No. 4 to the ITP, further extending the bid submission deadline to 14 March 2013.<sup>38</sup> The Transaction Advisors circulated the final SHA and SPA and the Disclosure Letter around one month later, on 21 February 2013.<sup>39</sup>
77. On 4 March 2013, two and a half months after it had been informed by Columbia of its withdrawal from the Consortium with Axos and Columbia's replacement by Najafi Companies, the GPC approved the change in consortium. The approval was first communicated by email in the following terms:

*This is to inform you that the Government Privatisation Committee (GPC) confirmed in its todays meeting your request for consortium change. Further to this approval, ACP Axos Capital GmbH can be appointed as a team leader and Najafi Companies LLC is approved as Consortium Member to the consortium led by ACP Axos Capital GmbH.*

*A formal notification will be sent to all Pre-qualified Tender Participants.*<sup>40</sup>

78. The following day, on 5 March 2013, *Koha Ditore*, a local newspaper, reported that Members of the Assembly from the opposition party, the League for Democratic Kosovo (LDK), questioned the lawfulness of the privatization tender:

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<sup>36</sup> Exhibit C-91.

<sup>37</sup> Exhibit C-92.

<sup>38</sup> Exhibit C-98.

<sup>39</sup> Exhibits C-101 and C-8.

<sup>40</sup> Exhibit C-9.

*Muhamet Mustafa, a Kosovo MP, suspects whether members of the consortium can be changed once the pre-qualification phase has ended, and companies to remain part of the privatization race.*

*“If some companies are prequalified and have expressed interest but the qualification period has ended, it shouldn't be possible to change the consortium without announcing a new expression of interest and without a verification,” said Mustafa. “I don't believe that a change of consortia in this way is permitted by international procurement rules, or either by bidding rules in Kosovo. I don't know what the inter-ministerial council was based on, they ought to explain this action.[”]*

*“For an economic expert, the process of privatization of PTK is unlawful.”*

*“The biggest problem is that the whole procedure is being conducted without a decision of the Assembly regarding the arrangements.”*

*[“]The decision which is referred to by the Ministry of Economic Development was never made in the Assembly, and the budget law — which in a way legalized the process of privatization — has only a one year validity, and ended on 31 December 2011,” said Mustafa. “There is no legal basis for the privatization of PTK.”<sup>41</sup>*

79. Two days after this article was published, on 7 March 2013, Kosovo issued Amendment No. 5 to the ITP regarding the Bid Submission Form<sup>42</sup> and the Transaction Advisors circulated the Disclosure Letter as well as Schedule 10 of the SPA (listing “Assets Essential to the Operation of the Company’s Telecom Business”).<sup>43</sup>
80. The following week, on 13 March 2013, the bid submission deadline was once more extended from 14 March 2013 until 3 April 2013.<sup>44</sup>
81. Having received Schedule 10 to the SPA on 7 March 2013, Axos wrote to the Transaction Advisors on 20 March 2013 raising concerns with the Schedule, as its reading of the document suggested that PTK might be privatized without the underlying telecommunication infrastructure:

*Since the guarantee catalogue from SPA never included the telecommunication infrastructure belonging to PTK, and only place where the infrastructure may be listed was the planned schedule 10 of the SPA (according to the clause 9.5.), we sent through our mark ups and repeatedly with separate letters the request to*

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<sup>41</sup> Exhibit R-6.

<sup>42</sup> Exhibit C-105.

<sup>43</sup> Exhibit C-106

<sup>44</sup> Exhibit C-107.

*include the infrastructure in to the guarantee catalogue. Since it never happened actually, we reasonably expected that PIU will use at least the possibility to list the essential infrastructure in to the schedule 10. Now we understand, and from your last letter it is definitely confirmed, that PIU or consultants never had considered to guarantee that the essential telecommunication infrastructure would be granted to PTK, meaning that the target entity should be totally dependent on the owner of the infrastructure in the future. And more, as seen from your letter, PIU does not make a single commitment that at least the three items listed in the schedule 10 are the telecommunication infrastructure belonging to PTK. Therefore, to back up your stand point that it may come to misunderstanding over the essential element of the sale process (if the telecommunication infrastructure and belongs to PTK and where is the list of such infrastructure), please refer to the relevant clause of SPA where such guarantee had been provided.*<sup>45</sup> (emphasis added)

82. Axos noted that if that understanding was correct, it would have a substantial impact on its analysis of the deal, and would cause it to seek compensation for expenses incurred in connection with the tender process:

*In opposite, we will conclude that the whole process was designed and conducted not to inform the participants in a transparent manner about the main element of the sale – the target entity PTK shall not be privatized with the belonging telecommunication infrastructure! Such assumption, if confirmed, will have a massive impact on our legal, technical and managerial efforts done so far, and we will reconsider not only participation with the bid as planned, but also will request remedies for the financing of expenses of the procedure under non-transparent terms.*<sup>46</sup> (emphasis added)

83. However, on the same date (20 March 2013), Axos received confirmation via the German ambassador to Kosovo that the telecommunication infrastructure was to be included in the sale of the shares in PTK. The email from the ambassador stated:

*I have confronted Minister Beqaj with your accusations over the phone today. After having conferred with his colleagues, he called me back and assured me that no changes were made to the conditions to tender. Later, when we met in person, he explained that merely the buildings would be excluded from the sale. However, this would have been clear from the beginning of the tender process and known to the tender participants for a long time; moreover, they could be rented under favourable conditions.*

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<sup>45</sup> Exhibit C-108.

<sup>46</sup> Exhibit C-108.

*The entire rest of the physical infrastructure of the company would be included in the sale.*<sup>47</sup>

84. The ambassador further conveyed to Axos that Kosovo would not be amenable to a further extension of the bid deadline:

*He [Minister Beqaj] asked that the changes you have claimed to the tender procedure should be communicated to the transaction advisers so they can make the necessary corrections. He also made it clear that another delay of the tender deadline would not be possible.*<sup>48</sup>

85. Two weeks later, on 3 April 2013, two of the pre-approved tender participants, M1 International Limited and the Axos/Najafi Consortium, submitted bids for the purchase of shares of PTK.
86. The Axos/Najafi bid was for EUR 277 million for 75% of the shares of PTK,<sup>49</sup> while M1 International Limited's bid was for EUR 150 million.<sup>50</sup>
87. The financial bids submitted by Axos/Najafi and M1 International Limited were opened at a meeting held in Pristina, Kosovo, on 12 April 2013, attended by the press and television.<sup>51</sup>

3. The Award of the Contract to the Axos/Najafi Consortium

88. Having received and reviewed Axos/Najafi's and M1 International Limited's respective bids, on 16 April 2013 the GPC issued the Privatization Report summarizing the privatization process and declaring Axos/Najafi the winning bidder in the privatization tender. The Privatization Report stated:

*Setting from the above, and after a transparent, professional procedure, and in full compliance with the legislation of the Republic of Kosovo, with the support of Transaction Advisor and Strategic Advisor, confirmed the consortium "ACP AxosCapitalGmbH - Najafi Companies LLC" as the most economically responsive bidder for the privatization of 75% of PTK shares.*<sup>52</sup>

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<sup>47</sup> Exhibit C-109.

<sup>48</sup> Exhibit C-109.

<sup>49</sup> Exhibits C-111, R-60, R-64, R-67, R-68, and R-75.

<sup>50</sup> Exhibit R-10.

<sup>51</sup> First Witness Statement of Besim Beqaj, ¶ 29.

<sup>52</sup> Exhibit R-10.

89. On that same date, the Government approved the Privatization Report and directed the GPC to proceed with the privatization process:

*DECISION*

*1. Approving the Report of the Government Committee for Privatization of 75% of the Publicly Owned Enterprise Post and Telecommunications of Kosovo JSC (PTK), for proclaiming the Consortium ACP Axos Capital GmbH - Najafi Companies LLC as the most economically responsive bidder.*

*2. the Government Committee for Privatization of 75% of the PTK shall further proceed with the privatization and sale of shares as per procedures defined in the bidding documentation for the privatization of 75% of shares of the PTK and applicable legislation.<sup>53</sup>*

90. Two days later, on 18 April 2013, the Transaction Advisors forwarded to Axos a letter from the GPC. The letter informed Axos that the Axos/Najafi Consortium had submitted the highest financial bid for 75% shares in PTK and stated:

*Please find attached the official notification of the award:*

[...]

*In accordance with the Instructions for Tender Participants, the Contracting Authority has treated the highest offered Purchase Price to be the economically most advantageous offer. We have the pleasure to inform you that you have submitted the highest Purchase Price as a reply to the Instructions for Tender Participants for the above-mentioned procurement activity.*

*The contract has been awarded to you with the price specified in your Financial Bid and in compliance with the terms and condition of the Instruction for Tender Participants.<sup>54</sup>*

91. The letter from the GPC went on to state that the contract award was provisional and conditional on potential requests for review by unsuccessful tenderers:

*The contract award is provisional and does not constitute a contractual arrangement until the interval has elapsed during which unsuccessful tenderers can seek a review of the decision.<sup>55</sup> (emphasis in the original)*

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<sup>53</sup> Exhibits R-11, C-113.

<sup>54</sup> Exhibit C-12.

<sup>55</sup> Exhibit C-12.

92. A few days later, on 23 April 2013, Axos issued a press release announcing that the Axos/Najafi Consortium, with its European and US investors, had won the privatization tender for 75% of the shares in PTK.<sup>56</sup> The same day, Deloitte, Axos' financial and tax advisor, provided Axos with the final draft of their Financial and Tax Due Diligence Report.<sup>57</sup>
93. The following day, 24 April 2013, Kosovo issued a formal contract award notice to "ACP Axos Capital GmbH in Consortium with Najafi Companies LLC." The contract award notice stated:

*II.1.1) Contract title attributed by the contracting authority:*

*Privatisation of 75 % of the shares of Post and Telecommunications of Kosovo J.S.C. (PTK)*

[...]

*II.1.3) Brief contract description*

*Offer for tender and sale of 75% (seventy five per cent) of shares of Publicly Owned Enterprise Post and Telecommunications of Kosovo J.S.C. (PTK)*

[...]

*IV.4) Name and addresses of the economic operator to whom the contract has been awarded*

*Official name: ACP Axos Capital GmbH in Consortium with Najafi Companies LLC.*<sup>58</sup>

#### 4. Events Following the Award of the Contract

94. On 24 April 2013, the very day that Kosovo issued the formal contract notice, Najafi by letter terminated its cooperation agreement with Axos and requested that Axos notify Kosovo of the same. Najafi's letter of termination stated:

*Pursuant to Section 8 of the Cooperation Agreement, we are hereby terminating the Cooperation Agreement and our participation in the Consortium and the Tender. Such termination is effective immediately.*

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<sup>56</sup> Exhibit R-69.

<sup>57</sup> Exhibit C-114.

<sup>58</sup> Exhibit C-115.

*Kindly ensure that there is no reference to, or mention of, Najafi as a member of the Consortium or, in any manner whatsoever, as being affiliated with Axos or the Consortium in connection with the Tender or the privatization of Kosovo Post. Also, kindly notify all regulating authorities who have been told that Najafi is a member of the Consortium (including the Government Committee for Privatization of Post and Telecommunications of Kosovo J.S.C. (PTK)) that we are no longer a member of the Consortium and have no interest in Kosovo Post or its privatization. Please provide us with a copy of your correspondence to the Privatization Committee informing them of the foregoing within five business days; note that if we do not receive such correspondence within five business days, we shall ourselves make the communication to the Privatization Committee.*<sup>59</sup>

95. This was not immediately notified by Axos to Kosovo, and Najafi wrote to Axos again on 16 May 2013, indicating that it was “*getting increasingly uncomfortable about the current situation.*”<sup>60</sup>
96. Also on 24 April 2013, the Transaction Advisors had circulated a presentation identifying next steps with timelines, such as the preparation of Final Transaction Documents between 17 May 2013 and 16 July 2013 with the latest date for signing of the Transaction Documents then envisaged to be 16 July 2013.<sup>61</sup>
97. However, a few days later, on 7 May 2013, Axos’ financial and tax advisors sent the Transaction Advisors a list of questions which, in Axos’ view, had not been fully addressed during the due diligence process.<sup>62</sup>
98. In addition, on 27 May 2013, the GPC met and proposed that the Government submit the Privatization Report to the Assembly for review. The GPC wrote to the Government confirming its proposal:

*The Government Committee for the Privatization of 75% shares of the Publicly Owned Enterprise “Post and Telecommunications of Kosovo JSC” (GPC), upon a meeting held on 27 May 2013, based on the Decision of the Government No. 01/125, of 16 April 2013, approving the GPC Report on Proclaiming the Most Economically Responsive operator for the privatization of 75% shares of the PTK, hereby proposes to the Government of the Republic of Kosovo to submit the report*

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<sup>59</sup> Exhibit R-46.

<sup>60</sup> Exhibit R-47.

<sup>61</sup> Exhibit C-13.

<sup>62</sup> Exhibit C-28.



*approved by the Government for further review to the next session of the Assembly of the Republic of Kosovo.*

*The GPC considers that the privatization process pursued a transparent, professional procedure, and in full compliance with laws of the Republic of Kosovo. This is confirmed by the Transaction Advisor and Strategic Advisor in their reports. Since we are now in the stage of contract signature and final closure of transaction, we consider that it is important that the same report is reviewed by the Assembly of the Republic of Kosovo. The GPC finds that the review of this report by the Members of Assembly of Kosovo would contribute to the transparency, and add value to an important process for implementing a structural reform in the economy of our country.<sup>63</sup> (emphasis added)*

99. For ease of understanding, the Tribunal will now provide a brief description of the subsequent events turning first to discussions between Axos and Kosovo (notably the GPC and Transaction Advisors) relating to the particulars of the deal (a) and second to the discussions related to the privatization process which took place at the same time, in parallel, but were internal to Kosovo (b).

a. Discussions between Axos and Kosovo relating to the particulars of the deal

100. Following Axos' issuance of a series of questions to the Transaction Advisors on 7 May 2013,<sup>64</sup> the Parties engaged in a lengthy process of discussions relating to the terms of the Transaction Documents and the evolution of the performance of PTK. While the Tribunal will not engage in an exhaustive account of the back-and-forth communications between Axos and the GPC and Transaction Advisors for the period covering the end of June to mid-August 2013, the following exchanges are of note.

101. First, on a number of occasions, Axos circulated amended drafts of the Transaction Documents, which Kosovo then reviewed:

- On 12 June 2013 Axos circulated marked-up versions of the SPA and SHA;<sup>65</sup>
- On 25 June 2013, the proposed mark-up was rejected by Kosovo;<sup>66</sup>

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<sup>63</sup> Exhibit R-12, see also Exhibit C-190.

<sup>64</sup> Exhibit C-28.

<sup>65</sup> Exhibit C-117.

<sup>66</sup> Exhibit C-14.

- On 2 July 2013, the Transaction Advisors followed up on the proposed amendments, confirming that the GPC could not accept any amendment to the Transaction Documents, but indicating that it might be prepared to consider certain specific proposals if those did not alter the documents;<sup>67</sup>
- On 4 July 2013, Axos responded, proposing various “side agreements and consents” that it suggested should be executed alongside the Transaction Documents;<sup>68</sup>
- Those proposals were examined in GPC internal meetings and in meetings between GPC and the Transaction Advisors on 12 July<sup>69</sup> and 15 July 2013<sup>70</sup> and were rejected on 16 July 2013;<sup>71</sup>
- On 6 August 2013, Kosovo reiterated its refusal to amend the Transaction Documents but confirmed that the GPC was committed to long-term post-completion arrangements to ensure that the transaction would go through.<sup>72</sup>

102. Second, the Parties also discussed PTK’s financial performance on a number of occasions:

- On 13 June 2013; the Transaction Advisors provided recent financial data showing a decrease in PTK’s revenues in the first quarter of 2013;<sup>73</sup>
- On 20 June 2013, Axos wrote to the Transaction Advisors with a list of specific questions concerning PTK’s financial performance;<sup>74</sup>
- On 21 June 2013, the Parties held a conference call to discuss PTK’s financial performance and the Transaction Advisors followed up on 24 June 2013;<sup>75</sup>

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<sup>67</sup> Exhibit C-15.

<sup>68</sup> Exhibit C-125.

<sup>69</sup> Exhibit C-191.

<sup>70</sup> Exhibit C-192.

<sup>71</sup> Exhibit C-126.

<sup>72</sup> Exhibit C-16.

<sup>73</sup> Exhibit C-118.

<sup>74</sup> Exhibit C-119.

<sup>75</sup> Exhibits C-120, C-121, C-122.

- On 26 June 2013, the Parties met in Pristina to discuss, *inter alia*, Axos' concerns about PTK's financial performance in early 2013;<sup>76</sup>
- On 26 July 2013, the Parties met again in Pristina to further discuss PTK's financial situation;<sup>77</sup>
- On 2 August 2013, Kosovo submitted an overview of PTK's planned investments, which Axos commented on three days later, on 5 August 2013.<sup>78</sup>

103. Third, having been informed by Innova on 13 June 2013 that it would not participate in the privatization or its financing,<sup>79</sup> Axos attempted to restructure the financing of the transaction. This became an object of discussions during the Parties' meeting of 26 June 2013.<sup>80</sup>

104. The discussions crystallized in early August 2013, when both Parties restated their interest in closing the transaction in a timely manner.

105. In particular, Axos confirmed on 9 August 2013 by letter that it was "ready to come and sign the Transaction Documents":

*We would like to express that it is in both of our greatest interests to accelerate the final closing date of the transaction and are available to meet in person to review the various positions any time.*

*With that understanding in place, we are ready to come and sign the transaction documents.*

*We are confident that all open issues will be solved in a mutually satisfactory way.*<sup>81</sup>

106. Also in a letter of 9 August 2013, the Transaction Advisors, while stating that Kosovo could not agree to any changes to the Transaction Documents, confirmed that Kosovo was committed to the success of the privatization process:

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<sup>76</sup> Exhibit C-123.

<sup>77</sup> Exhibit C-129; First Witness Statement of Jan Budden, ¶ 171; Witness Statement of Robert Woog, ¶ 46.

<sup>78</sup> Exhibits C-29, R-39, R-41.

<sup>79</sup> Exhibit R-53.

<sup>80</sup> Exhibit C-123.

<sup>81</sup> Exhibit C-131.

*Further to your letter dated August 9, 2013, we are instructed by the Government Privatization Committee (the “GPC”) to inform you that the GPC remains committed to achieving a successful privatization of PTK.*

*As previously notified to you, GPC regrets that it cannot agree to any changes to the Transaction Documents which you have indicated in your binding bid that you are prepared to sign.<sup>82</sup>*

107. In keeping with this position, the Transaction Advisors wrote to Axos on the same day to obtain the information necessary to complete the Transaction Document templates.<sup>83</sup>
108. A few days later, on 13 August 2013, Axos confirmed that it would sign the Transaction Documents as drafted in the bid submitted on 3 April 2013, stating: “*We confirm we will sign the transaction documents in the form they are initialized by us as part of our binding bid dated April 3rd 2013 submitted according to process*”.<sup>84</sup>
109. On that same day, the Transaction Advisors reached out to Axos again, asking for the necessary “information/documents needed to finalise the Transaction Documents”, and indicating that the GPC reserved its rights under the ITP in the event that the Consortium failed to provide the requested information by 30 August 2013:

*I am instructed to inform you that your failure to provide this information within the time limits mentioned will be considered by the GPC as breach of the condition applying to the extension, in which circumstances the GPC reserves all its rights under the Instruction for Tender Participants and at law, including the existing Bid Bond.<sup>85</sup>*

110. Among the information sought by the Transaction Advisers was the documentation related to the SPV which would sign the Transaction Documents:

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<sup>82</sup> Exhibit R-19.

<sup>83</sup> Exhibit C-132.

<sup>84</sup> Exhibit R-35.

<sup>85</sup> Exhibit C-22.

*This extension is however strictly conditional on your sending  
[...]*

*- the previously requested information, including in particular details of the SPV company which will execute the Transaction Documents, no later than 30 August 2012 [sic].<sup>86</sup> (emphasis added)*

111. Nearly two weeks later, on 28 August 2013, Axos Telecom B.V., the Axos entity that would sign the Transaction Documents, was incorporated in the Netherlands, with Axos as the sole shareholder,<sup>87</sup> and on 30 August 2013 Axos provided the requested information to the Transaction Advisors, reiterating in its cover email its interest in closing the transaction:

*Please find attached the list of information that you have requested for signing of the SPA.*

*We wish to emphasize again that we are interested and ready to sign the documents and proceed to close the process and are dedicated to finalize the transaction.<sup>88</sup>*

112. Having received the necessary information, on 3 September 2013 the GPC wrote to the Chairman of the Assembly, requesting that the review of the Privatization Report be placed on the agenda for the next plenary session.<sup>89</sup> (This review process is described in more detail in the following sub-section of this Award.)
113. The discussions at the Assembly took some time. In parallel, Axos expressed renewed concerns about PTK's performance and on 3 November 2013 requested additional information on several issues:

*Thank you for the financial report for the first 3 quarters 2013. We assume that these results are valid and audited and are a qualified base for our future cooperation.*

*Based on the reports we have the following initial questions for explanation and clarification to be received latest by mid of next week (Nov 6th). Moreover we require an explanation for this dramatic underperformance.*

*[...]*

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<sup>86</sup> Exhibit C-22.

<sup>87</sup> Exhibit C-136.

<sup>88</sup> Exhibit C-136.

<sup>89</sup> Exhibit R-20.

*We must express again our growing concern and dissatisfaction on the underperformance of PTK which is in the sole responsibility of the seller. Finally we remind you to respond in a constructive approach in the interest of a successful closing of the privatization process to our letter of position we submitted by tomorrow 12 days ago.*<sup>90</sup> (emphasis added)

114. Axos' concerns were discussed at a meeting held in Pristina on 22 November 2013,<sup>91</sup> and Axos followed up via email on the next day.<sup>92</sup>
115. Following those last exchanges, Kosovo circulated a checklist for the signing of the Transaction Documents on 16 December 2013,<sup>93</sup> and informed Axos on 20 December 2013 that the cut-off date for signing the Transaction Documents would be 30 December 2013.<sup>94</sup> A further checklist was circulated a few days later, on 23 December 2013.<sup>95</sup>
116. As will be explained below, Kosovo decided to cancel the transaction on 30 December 2013.

b. Parallel discussions related to the privatization process internal to Kosovo

117. In parallel with the Parties' ongoing discussions over the terms of the transaction, and following the GPC's proposal of 27 May 2013 that the Government submit the privatization process to scrutiny by the Assembly,<sup>96</sup> on the same day the Government wrote to the President of the Assembly to ask for the Assembly's review of the Privatization Report:

*The GPC established by the Government of Kosovo, pursuant to the legal framework, in its last meeting recommended the review of the report also by the Assembly of the Republic of Kosovo. The Government of the Republic of Kosovo requests the Assembly Presidency to review the report in one of the upcoming plenaries of the Assembly of the Republic of Kosovo.*

[...]

*We consider that the discussion and the review of the GPC report by MPs in the process of PTK privatization at a stage when the entire process is not yet completed,*

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<sup>90</sup> Exhibit C-144.

<sup>91</sup> First Witness Statement of Jan Budden, ¶¶ 189-190.

<sup>92</sup> Exhibit C-148.

<sup>93</sup> Exhibit C-151.

<sup>94</sup> Exhibit C-25.

<sup>95</sup> Exhibit C-153.

<sup>96</sup> Exhibit R-12, see also Exhibit C-190.

*will contribute the transparency and will add value to this important process for the implementation of structural reforms in our country's economy.*<sup>97</sup>

118. Following that request, on 25 June 2013, public meetings were held by the Assembly Committee for Economic Development, Infrastructure, Trade and Industry, with members of the GPC, the Transaction Advisors, and representatives of the British and German embassies in attendance.<sup>98</sup>
119. This apparently sparked discussions in the Assembly, and the following day, 26 June 2013, the Head of the Assembly Committee for Foreign Affairs, Mr. Albin Kurti, wrote to the European Bank for Reconstruction and Development, questioning whether Axos had the capability to take over PTK and indicating that his political party would try to halt the privatization process:

*However, equally concerning is the fact that Axos Capital Partners, which leads the winning consortium for the privatization of the telecom in Kosovo is, an unknown entity lacking the financial assets to engage in this privatization, as I will outline below.*

[...]

*We have therefore requested a parliamentary committee of inquiry into the privatization of PTK, and we are undertaking all measures in place internationally and locally to investigate and stop this process.*<sup>99</sup>

120. Nevertheless, the Economic Committee, which had held the 25 June 2013 public hearing, endorsed the privatization process and referred the Privatization Report to a plenary session of the Assembly on 30 July 2013:

*Committee on Economic Development, Infrastructure, Trade and Industry (hereinafter: the Committee), pursuant to article 62 of the Rules of Procedure of the Assembly, in its regular meeting of 30 July 2013, with a majority vote, decided to submit to the Assembly the following*

*Recommendation*

- 1. To endorse the Government Committee Report for the Privatization of 75% shares of PTK.*<sup>100</sup>

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<sup>97</sup> Exhibit R-13.

<sup>98</sup> Exhibit R-15.

<sup>99</sup> Exhibit R-78.

<sup>100</sup> Exhibit R-18.

121. When the Privatization Report was brought before the plenary session of the Assembly, first on 12 September, and then again on 19 September and 26 September 2013, the Assembly could not vote on it, as it was not quorate on either of those sessions.<sup>101</sup>

122. This prompted the PIU to write to Axos on 24 September 2013 to confirm the GPC's mandate for privatization of PTK, but also to convey that the outcome of parliamentary discussions might have an impact on that mandate:

*We would like to draw your attention to the fact that even though the GPC, based on Kosovo Constitution and legal framework, has a clear mandate for the privatization of PTK, the outcome of the parliamentary decision on PTK privatization report can impact on the GPC's position towards this project.*<sup>102</sup>

123. As the political review process was not completed, the Transaction Advisors wrote to Axos on 14 October 2013, requesting a further extension of the signing date:

*Following the letter sent to you on September 25th, 2013, we are instructed by the Government Privatization Committee (the "GPC") to inform you that the report on Privatization of PTK Kosovo covering the process of privatization is still in a process of discussion in the Assembly of Republic of Kosovo. Therefore GPC is considering and would like to ask you if you are ready for a further extension of the signing date by end of December 2013 (or latest first week of January 2014) and completion by end of January 2014.*<sup>103</sup>

124. This further extension of the completion date was agreed to by Axos two days later, on 16 October 2013. In its letter, Axos stated "[w]e understand the importance of this and again agree to your requested delay for the promulgation".<sup>104</sup>

125. In the last days of 2013, however, the GPC and PIU held a series of meetings to discuss the progress of the Privatization Report in the Assembly and address further postponement of the signing of the Transaction Papers.<sup>105</sup>

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<sup>101</sup> Exhibit C-139.

<sup>102</sup> Exhibit C-21.

<sup>103</sup> Exhibit C-23.

<sup>104</sup> Exhibit C-24.

<sup>105</sup> Exhibits C-201, C-194.



126. On 26 December 2013, the Privatization Report was again discussed at the Assembly, but the discussion did not result in a vote as the Assembly was again not quorate.<sup>106</sup>

5. The Cancellation of the Privatization Process

127. On 30 December 2013, the GPC held a last meeting to discuss the situation resulting from the Assembly's failure to vote on the Privatization Report, and concluded that there was no basis for further postponement of the transaction. This decision was summarized in minutes of the meeting in the following terms:

*The Government Privatization Committee of PTK (GPC) has analysed the situation appearing upon failure in the Assembly of Kosovo, in the session of 26 December 2013, in reviewing the report on the privatization of 75% of the PTK shares.*

*As you may have been aware before, based on the tender documents for the PTK privatization, which made the basis for the application of bidders to the tender, the date of 30 December 2013 was the last date for signature of the contract. Based on the legal opinion received from the Transaction Advisor, there is no legal basis for any further postponement of the date.<sup>107</sup>*

128. Although the minutes of the meeting do not explicitly mention the cancellation of the privatization process, Mr. Fadil Ismajli clarified in his witness statement filed in the arbitration that it was at this meeting that the GPC decided to cancel the privatization process. However, he cited the GPC's loss of confidence in Axos, rather than the situation at the Assembly, as the reason for such cancellation:

*At the end of the GPC's meeting of 30 December 2013, the GPC's ministers and I concluded that Axos had not acted as a credible investor and potential majority shareholder in PTK, along with serious issues raised by the Long Stop Date. The GPC had gradually lost trust in Axos' ability and seriousness to perform its obligations in the privatization process. We, thus, decided to cancel the privatization of PTK under Article 1.1 of the ITP that permitted the GPC to cancel it "until the signing of the Transaction Documents." We never doubted at the time that this provision of the ITP allows the GPC for the cancelation of the privatization of PTK.<sup>108</sup> (emphasis added)*

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<sup>106</sup> Exhibit C-155.

<sup>107</sup> Exhibit R-21.

<sup>108</sup> Witness Statement of Fadil Ismajli, ¶ 33.

129. This decision was conveyed to Axos the following day, 31 December 2013, during a conference call,<sup>109</sup> and subsequently publicly announced on the website of the Ministry of Economic Development:

*GPC decides to close the PTK privatization process*

*Prishtina, 31.12.2013 – Government Privatization Committee (GPC) for PTK met yesterday to analyze and discuss on the situation in relation to the privatization of PTK, after a lack of quorum in the plenary session of the Assembly of Kosovo on December 26, 2013, to review the privatization process report for 75% shares of this publicly owned enterprise.*

*GPC wishes to inform the public that according to the PTK privatization tender documents, which constitute the basis for application of tender participants, December 30, 2013, was the final possible date for the signing of this tender contract. According to the legal opinion of the Transaction Advisor, GPC has no legal basis, to further postpone this date.*

*Faced with this situation and unable to proceed with the signing of the contract for the sale of PTK shares, GPC has decided to close the privatization process of 75% shares of PTK.<sup>110</sup>*

130. The cancellation was officially notified to Axos by letter the following week, on 6 January 2014:

*We refer to the above matter, in particular the telephone conference call on 31<sup>st</sup> December 2013 at which you attended and to the Instructions for Tender Participants dated September 11<sup>th</sup> 2012 (ITP). This letter is by way of confirmation of the notice provided during the telephone conference namely: that the government of the Republic of Kosovo, duly represented by the GPC, and inter alia in accordance with its right referred to in paragraph 1.1 of the ITP, has cancelled the privatisation of PTK.*

*The cancellation was effective from the date of notification on 31<sup>st</sup> December 2013.<sup>111</sup>*

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<sup>109</sup> First Witness Statement of Jan Budden, ¶ 195.

<sup>110</sup> Exhibit C-32.

<sup>111</sup> Exhibit C-33.

131. Axos subsequently filed an appeal against the cancellation notice under the Kosovo Law on Private-Public Partnerships on 16 January 2014,<sup>112</sup> and on 30 January 2014 notified Kosovo of its intention to seek redress through arbitration.<sup>113</sup>
132. To date, PTK remains publicly owned by Kosovo, and no further attempts have been taken to privatize it.

### **C. Decision of the Tribunal Regarding Jurisdiction and Admissibility**

#### **1. Preliminary Observations**

133. Kosovo has raised several jurisdictional and admissibility objections. Kosovo's principal objection is that Axos has not established the existence of a protected investment within the meaning of Article 1(1) of the Treaty.<sup>114</sup> Relatedly, Kosovo argues that Axos has not established that it has made an investment within the meaning of the ICSID Convention.<sup>115</sup>
134. With respect to Kosovo's principal objection, Article 1(1) of the Treaty defines the term "investments" as follows:

#### *Article 1*

*(1) The term "investments" shall comprise every kind of asset which has been invested in conformity with national legislation, more particularly but not exclusively:*

*(a) Movable and immovable property as well as any other rights in rem, such as liens and pledges of all kinds and similar rights;*

*(b) Shares of companies and similar forms of investment;*

*(c) Claims to money which has been used to create an economic value or claims to services or benefits in kind which have an economic value and are connected with an investment;*

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<sup>112</sup> **Exhibit C-34.**

<sup>113</sup> **Exhibit C-163.**

<sup>114</sup> Respondent's Counter-Memorial, Section III, Subsections B, C, and D.

<sup>115</sup> Respondent's Counter-Memorial, Section III, Subsection E.

*(d) Copyrights, industrial property rights such as inventor's rights including patents, trade marks, trade names, industrial patterns and models, technical processes, know-how and goodwill;*

*(e) Business concessions under public law, including concessions in connection with the use of natural resources.*

*Any alteration of the form of the investment shall not affect its classification as investment within the meaning of this Treaty.*<sup>116</sup>

135. Axos has advanced two distinct jurisdictional theories to justify the existence of a protected investment under the Treaty.
136. Its main jurisdictional theory is based on the existence of a contract arising from the exchanges between the Parties on 3 April 2013 and 18 April 2013.<sup>117</sup> This theory was described as follows during the hearing:

*Now, it's the Claimant's position that the contract which it concluded with the Respondent constituted an asset invested in conformity with national legislation, and therefore an investment under the BIT, as well as the ICSID Convention [...]*<sup>118</sup>

*So to conclude, sirs, the Claimant maintains its position that a valid contract was concluded, that entered into effect following the expiry of the ten-day period after receipt of the award notice dated 18th April 2013, and that this constituted Axos' investment for the purposes of the BIT.*<sup>119</sup>

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<sup>116</sup> Exhibit C-1.

<sup>117</sup> Exhibits C-111 and C-12, respectively. (At paragraph 144 of the Claimant's Reply, when discussing the relevance of *Nordzucker v Poland* to the present case, the Claimant asserted that "even if the Tribunal were to accept the (erroneous) contention from Kosovo that the Contract had not been formed, it would still have jurisdiction over Axos' claims in respect of FET". This sentence was neither repeated in the Claimant's Rejoinder nor at the hearing. It is unclear whether it is maintained by the Claimant. The Rejoinder rather suggests that this position was abandoned. When analysing *Nordzucker v Poland* at paragraphs 62 to 68 of the Claimant's Rejoinder, the Claimant concluded its argument by stating "[g]iven that (i) a binding agreement had been concluded between Axos and the State and (ii) Axos' investment was in fact more advanced than that of *Nordzucker* in the Szczecin Group, it is clear that the Contract was, at the very least, an investment in the making". Here, the Claimant seemed to have now taken the position that even though the SPA had not been signed, the conclusion of a binding agreement by way of the exchange between the Parties on 3 April 2013 and 18 April 2013 amounted, at the very least, to an investment in the making. This reading is further confirmed by the header under which the Respondent made that argument; III.3.1.1(B)(1) reads "The Contract is an 'asset', and therefore a protected 'investment'". To the extent the Claimant maintains the position it had taken in the Claimant's Reply, that argument was never explained to the Tribunal with any degree of specificity. Presented as such, it remained a mere assertion. As a result, to the extent that this would constitute a distinct jurisdictional theory, it can only be rejected.)

<sup>118</sup> Tr. Day 1, 40:21-25. See also Claimant's Memorial, Section 5.1.2(A) and Claimant's Reply, Section 4.1.2(A).

<sup>119</sup> Tr. Day 6, p. 68:17-22.

137. The alternative jurisdictional theory is that Axos has a “claim to money” as defined in Article 1(1)(c) of the Treaty arising from the monies spent for the preparation of the tender and for know-how it said it had transferred to Kosovo.
138. This alternative jurisdictional theory was not pressed at the hearing, as was made clear during the Claimant’s opening at the hearing:

*In addition, the Claimant also submits that it has: “Claims to money which has been used to create an economic value ...” within the meaning of Article 1(1)(c) of the BIT. This latter point has been set out in detail in Axos’ pleadings. See, for example, section 5.1.2(c) of its first memorial and 4.1.2(b) of its second memorial. So I shall concentrate on Axos’ primary position of the contract today.*<sup>120</sup>

139. This alternative position was described as follows in Axos’ Memorial:

***(C) The Claimant also has claims to money which has been used to create an economic value***

*269. As explained above, the Contract constituted an investment that is protected under the BIT. In addition, the money spent by the Claimant in connection with the Contract is also protected by the BIT, as “money which has been used to create an economic value” (under Article 1(c) of the BIT).*

*270. As explained above in Section IV, the Claimant incurred significant costs and expenses in the preparation of its Bid. As detailed in Mr. Budden’s witness statement, the Claimant’s Bid set out in significant detail the ways in which the business of PTK could be made more profitable, and was the product of the considerable experience, know-how and strategic insight of the consortium and its strategic partners. This information was compiled and collated at the Claimant’s cost, was clearly of economic value, and was provided by the Claimant on the basis that the Claimant reasonably understood that the bidder not only complied with the requirements of the tender process but also presented the most attractive bid and would become the successful bidder.*<sup>121</sup>

140. This alternative jurisdictional theory was also confirmed in the Reply Memorial:

*167. First, the Respondent again misrepresents Axos’ case. Axos’ submission that its “[c]laims to money which has been used to create an economic value” are an “investment” under the BIT is not, as Kosovo claims, “based on the sole fact that it spent money in the Tender”. In fact, it is the sums spent (and know-how*

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<sup>120</sup> Tr. Day 1, p. 41:2-10.

<sup>121</sup> Claimant’s Memorial, ¶¶ 269-270.

*contributed) by Axos in connection with the Contract which constitute “[c]laims to money”. Kosovo attacks an argument which Axos has not made.*

*168. Second, as further set out in this Reply, Axos has provided details of the know-how which it shared, both before and after the Contract's conclusion, and “how much” expenditure was incurred in connection with the Contract. The latter sum totals €702,728.21, as further set out in the Second Witness Statement of Mr. Budden.<sup>122</sup> (emphasis added)*

141. The Claimant’s alternative theory is thus part of Axos’ case and will be addressed as such.

142. The Tribunal will therefore examine each of these two jurisdictional theories in turn.

2. Axos’ Claim that the Exchange of 3 April 2013 and 18 April 2013 Constituted a Contract which is a Protected Investment

a. The Parties’ arguments

143. In this arbitration, Axos does not rely specifically on any of the subparagraphs of Article 1(1) in advancing its argument that it has a protected investment in the form of a contract. Rather, it argues that the exchange of 3 April 2013 and 18 April 2013 constituted a contract which falls within the scope of the “every kind of asset” language of the Treaty. As it states in its Memorial:

*159. Article 1(1) of the BIT defines “investments” as “every kind of asset”. As has been explained above:*

*a. Pursuant to the Award Notice, Axos and Kosovo concluded a binding contract (the Contract).*

*b. Pursuant to the Contract, Axos obtained a substantive right to acquire 75% of the shares in PTK, in return for which it was bound to pay a purchase price of €277 million.*

*c. The Contract, and Axos’ rights under it, constitute an “asset” under Kosovan law.*

*160. It follows that the Contract was an “investment” within the meaning of Article 1(1) of the BIT.<sup>123</sup>*

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<sup>122</sup> Claimant’s Reply, ¶¶ 167-168. See also Claimant’s Rejoinder, Section 3.1.2.

<sup>123</sup> Claimant’s Reply, ¶¶ 159-160.

144. Axos contends that by submitting its binding offer on 3 April 2013,<sup>124</sup> it made an offer in the sense of the Kosovo Law on Obligations and that, on 18 April 2013,<sup>125</sup> the GPC accepted this offer by sending a letter to Mr. Budden confirming the award of the privatization contract.<sup>126</sup> This contention was set forth in the Claimant’s Memorial:

*In this Dispute, the Respondent initiated a tender for the sale of 75% of the shares in PTK in accordance with the terms of the ITP. On 3 April 2013, the Claimant submitted the Bid Submission Form together with an initialled copy of the Final Transaction Documents, which specified the property being purchased, and the Financial Bid, which set out the purchase price, pursuant to Article 6.1 of the ITP. Thus, the Claimant's Bid constituted a legally binding and irrevocable offer which contained all the essential elements of a sales contract, namely (1) the proprietary rights and (2) the purchase price.*

*On 18 April 2013, the Respondent accepted the Claimant’s offer through the Award Notice. The binding, contractual language of the Award Notice demonstrates the Respondent's clear statement of intent to conclude a contract with the content and the price specified in the Claimant’s offer.<sup>127</sup>*

145. Kosovo has denied that there was either an offer or an acceptance as required by Kosovar law for the formation of a valid contract, but has not denied the jurisdiction of the Tribunal to decide whether, under Kosovar law, a contract was validly formed. As it stated in its Counter-Memorial:

*As Mr. Qerimi confirms, Axos acquired no binding legal right over PTK’s shares. Axos argues that Kosovo’s “acceptance became legally binding, and a contract (the Contract) between the Claimant and the Respondent for the purchase of 75% of PTK shares for €277 million, with the content of the Final Transaction Documents, was formed (Articles 59(2) and 13 of the LOR).” This argument is demonstrably wrong.<sup>128</sup>*

146. Kosovo adds that the issue whether a valid contract was formed must not only be examined under the Kosovo Law on Obligations but rather that it must also be examined under the relevant Kosovar administrative public laws which prescribe certain additional formal requirements.

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<sup>124</sup> Exhibit C-111.

<sup>125</sup> Exhibit C-12.

<sup>126</sup> Claimant’s Memorial, Section 5.1.2(A).

<sup>127</sup> Claimant’s Memorial, ¶¶ 238-239.

<sup>128</sup> Respondent’s Counter-Memorial, ¶ 116 (footnote reference omitted)

*It is therefore clear that Kosovar public procurement law—made applicable by the Law on POEs, the Law on PPPs, and the Law on Public Procurement—governed the Tender, including the alleged rights acquired by Axos in the course of the Tender.*<sup>129</sup>

[...]

*The applicable public law regulations also clearly require that any contracts arising from the procedures of privatization, public and private partnership and/or public procurement be signed. Article 50 of the Law on PPPs is unmistakably clear on this point.*<sup>130</sup>

147. For its part, Axos and its expert deny that Kosovar administrative law has any role to play in the formation of the alleged contract. They contend that only the Kosovo Law on Obligations is relevant. This contention was set forth by Axos' expert in her third expert report:

*Accordingly, for all of the above reasons, the only conclusion that can be reached is that the LOR applies to the formation of the contract between Axos and Kosovo regardless of the Law on PoEs, Law on PPP or Law on Public Procurement.*<sup>131</sup>

148. The corresponding legal materials,<sup>132</sup> relevant case law and commentaries<sup>133</sup> have been submitted to the Tribunal. Each side's expert has also opined on these materials at the hearing.
149. As a result, the Tribunal is satisfied that, by agreement of the Parties, it has jurisdiction to decide, first, whether there was, as claimed by Axos, a contract validly formed under Kosovar law and, second, if such a valid contract was formed, whether that contract is properly characterized as a protected investment under Article 1 of the Treaty.
150. Of course, if the Tribunal concludes that no valid contract was formed under Kosovar law as claimed by Axos this would be sufficient to dismiss Axos' main jurisdictional theory. This is because the existence of such a valid contract is predicate to Axos' jurisdictional theory in this arbitration.

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<sup>129</sup> Respondent's Counter-Memorial, ¶ 115.

<sup>130</sup> Respondent's Counter-Memorial, ¶ 118 (footnote reference omitted).

<sup>131</sup> Third Expert Report of Nina Plavšak, ¶ 11.

<sup>132</sup> Exhibits C-35, C-36, C-37, C-38, C-39, C-45.

<sup>133</sup> First, Second and Third Expert Reports of Nina Plavšak and First and Second Expert Reports of Qerim Qerimi and exhibits thereto—notably exhibits **Qerimi-1, 16, 18, 19, 20, 21, 23**.



151. It follows that the Tribunal will therefore examine whether a valid contract was entered into at the occasion of the exchange between the Parties consisting of the bid submission of 3 April 2013 and the GPC letter of 18 April 2013.<sup>134</sup>

b. Was a valid contract entered into between Axos and Kosovo?

152. Having carefully reviewed the material on the records, the Tribunal concludes that no valid contract for the purchase of the shares of PTK was ever formed between Axos and Kosovo. There are many reasons leading to this conclusion, each of which taken individually is sufficient to reach that conclusion. The Tribunal nonetheless believes that it is preferable to go through each of these reasons. As explained in the subsections that follow, there is no valid contract because the bid submission of 3 April 2013 is not an offer within the meaning of the Kosovo Law on Obligations (i). In addition, irrespective of whether there had been an offer, the 18 April 2013 letter would not constitute an acceptance (ii). Moreover, the bidder at the time of the exchange is not the Claimant in this arbitration. The bidder was the Consortium comprised of Axos jointly with Najafi whilst the Claimant is Axos alone (iii). Further, there could be no contract prior to the signing of the SPA because Kosovo retained the unfettered right to “cancel the Tender” until that date (iv). The Tribunal also accepts that Kosovar administrative law is relevant to determine whether the contract for the privatization of PTK was entered into and that the requirements of Kosovar administrative law were not complied with (v). Finally, the Tribunal notes that the conduct of the Parties after the exchanges of 3 April 2013 and 18 April 2013 also does not support the Claimant’s position that the Parties believed at the time that they had entered into a binding contract (vi).

i. The 3 April 2013 Bid Submission is not an offer within the meaning of the Kosovo Law on Obligations

153. Article 15 of Kosovo Law on Obligations classically provides that “[a] contract shall be deemed concluded when the contracting Parties agree upon essential elements of the contract.”<sup>135</sup>

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<sup>134</sup> Exhibits C-11 and C-12.

<sup>135</sup> Article 15, Exhibit C-35.

154. It further defines an offer as follows:

*1. An offer is a proposal made to a specific person for the conclusion of a contract and contains all the essence of the contract, such that through the acceptance thereof a contract could be concluded.*

*2. If after reaching agreement on the essence of the contract the contracting parties defer any accessory points, the contract shall be deemed to have been concluded, while if the contracting parties fail to reach agreement themselves on the accessory points they shall be regulated by the court, which in so doing shall take into consideration the previous negotiations, the practice established between the parties, and custom.*

*3. A proposal addressed to an Indeterminate number of persons that contains the essence of a contract shall be deemed an invitation to submit offers unless it follows otherwise from the circumstances.*<sup>136</sup>

155. An offer is therefore a proposal that is of such nature that, upon acceptance thereof, the contract can be concluded and both parties will be bound by its terms.

156. The bid submission of 3 April 2013 does not contain the elements of an offer.

157. The bid submission comprises many documents, among which the most important are the “Detailed Bid Document”<sup>137</sup> and the “Binding Financial Offer.”<sup>138</sup>

158. The Detailed Bid Document is not an offer to acquire the shares of PTK, but an offer to be selected as a “Preferred Bidder”, as this term is defined in the ITP, with a view to eventually concluding the acquisition. The Detailed Bid Document thus indicates that it was prepared “*In reference to your Tender Specifications distributed to us by Lazard & Raiffeisen*”, in other words, the ITP.<sup>139</sup>

159. By its plain terms, the Detailed Bid Document provides that the “Consortium”:

*is pleased to submit this binding bid proposal (“Proposal”) for the acquisition of not less than 75% of the issued share capital of PTK J.S.C., (“Telekom” or the “Company”). We appreciate the opportunity to participate in this process and look*

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<sup>136</sup> Article 22, **Exhibit C-35**.

<sup>137</sup> **Exhibit C-111, R-68**.

<sup>138</sup> **Exhibits C-11, R-60**.

<sup>139</sup> **Exhibit C-111, R-68**, p. 2

*forward to finalizing this transaction in the best-balanced interests of the Government and those of the people of Kosovo...*<sup>140</sup> (emphasis added)

160. This document concludes:

*We appreciate the opportunity to present this proposal and look forward to working with you on an exclusive basis for a successful privatization.*<sup>141</sup> (emphasis added)

161. For its part, the Binding Financial Offer likewise makes an express reference to the ITP. It provides for a Purchase Price “*as defined in the ITP*”.<sup>142</sup> It also states that this Purchase Price is based on certain assumptions, implying therefore that it could be adjusted if those assumptions proved to be inaccurate: “*The Purchase Price is based on the assumption that at Closing of the Transaction, the net debt shall be zero (0).*”<sup>143</sup>

162. It is therefore clear that the Binding Offer was made under the ITP and that its proposed terms were subject to further discussions.

163. The ITP, for its part, makes clear that it is not, in itself, an offer to sell the shares of PTK or to conclude a SPA: “*None of the information set forth herein constitutes a formal offer to enter into an SPA, nor does this ITP document oblige the GoK, the GPC, or any other related entity to proceed with the Tender.*”<sup>144</sup>

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<sup>140</sup> Exhibit C-111, R-68, p. 1.

<sup>141</sup> Exhibit C-111, R-68, p. 5.

<sup>142</sup> Exhibits C-11, R-60, p. 2.

<sup>143</sup> Exhibits C-11, R-60, p. 2.

<sup>144</sup> Exhibit C-7, Section. 1.1.

164. Rather, the ITP contemplates various steps following the selection of the first-ranked Bidder that would lead to the signature of the SPA. Those steps are described at section 2, as follows:<sup>145</sup>

Milestone	Time
Tender Launch	September 11, 2012
Due diligence and visits to the Company	September 17 – November 16, 2012
Submission of mark-ups of Transaction Documents and proposal of escrow bank	October 08, 2012
Bid-submission	November 19, 2012
Selection of first-ranked Bidder	November 26, 2012
Signing of the SPA	December 14, 2012
Closing of the Transaction	February 13, 2013

165. It is clear from the above that the signing of the SPA and the closing of the transaction was contemplated to take place after the selection of the first-ranked Bidder. By submitting a binding offer under the ITP, the Consortium accepted as much.

166. This is also confirmed by the definitions of the terms “Award” and “Selected Bidder” in the ITP.

167. The term “Award” is defined as “*the act of legally bestowing the status of Selected Bidder to a Bidder in accordance with the eligibility and evaluation criteria set forth in the IPQ and ITP.*”<sup>146</sup>

168. The term “Selected Bidder” is defined as “*a Bidder who has received the Award and has been invited by the Contracting Authority to enter into the Transaction Documents.*”<sup>147</sup> (emphasis added)

169. There is therefore no ambiguity that, in submitting a binding offer under the ITP, the Consortium did not make an offer to buy the shares of PTK, but rather it made an offer to become a Selected

<sup>145</sup> Exhibit C-7, Section. 2.

<sup>146</sup> Exhibit C-7, p. 2. Emphasis added.

<sup>147</sup> Exhibit C-7, p. 4.

Bidder, as this term is defined in the ITP. There is no indication in the binding offer made by the Consortium that it intended it to be something other than a binding offer under the ITP.

170. This finding is further confirmed by the legal consequences provided for under the ITP in case the Selected Bidder fails to sign the Transaction Documents within a specified time period. Under Article 5.4, such failure “*entitles the Contracting Authority to exercise its rights under the Selected Bidder’s Completion Security*”. Article 11(1)(iii) of the ITP foresees the same legal consequence. Article 11(2) further provides that in the event of such a failure, the GPC may award the Tender to the Second Ranking Bidder. Annex 6 of the ITP contains the template for the Completion Security in the sum of EUR 10,000,000. Under Article 4.1 of Annex 6, the GPC may demand payment under the Completion Security if it states that “*the Contractor has failed to sign or execute and return the Contract in the form required by the ITP, within 15 days of the date of the Award Notice*”. Under Amendment (2) to the ITP, certain changes were made (in particular the Completion Security would only need to be submitted at the time of the signing of the SPA, and bidders would instead be required to submit a Bid Bond for an amount of EUR 3,000,000 with their bids),<sup>148</sup> but the principle remained the same.<sup>149</sup> The Tribunal therefore notes that the ITP did not provide for specific performance, i.e., the payment of the purchase price for the shares, but rather for a demand under the security provided from the Selected Bidder during the tender process, allowing the GPC at the same time to continue with that process by awarding the Tender to the Second Ranking Bidder. Consistent with the ITP, the Transaction Advisors indeed reminded the Claimant by letter dated 16 July 2013 of their right to exercise the Bid Bond if Axos, as the Selected Bidder, did not execute the Final Transaction Documents within a specific time frame.<sup>150</sup> That mechanism further suggests that the selection of the first-ranked Bidder did not constitute the conclusion of the contract to buy the shares, but was only a further milestone in the tender process leading to the potential conclusion of such a contract.

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<sup>148</sup> **Exhibit C-87.**

<sup>149</sup> Under Article 1.2 of the Bid Bond (**Exhibit R-67**, p. 1), Axos “proposed to respond to the ITP with a Bid (Bid), dated 03 April 2013, to enter into a share purchase agreement (Contract) with you in connection with the Transaction”. And under Article 4.3, the GPC may demand payment under the Bid Bond if “[t]he Bidder was aw[a]rded the contract on the basis of its Bid and the Bidder then refused or failed to conclude the Contract” within the specified time.

<sup>150</sup> **Exhibit C-126.**

171. The offer to become a Selected Bidder does not therefore qualify as an offer that could be readily accepted, such that a contract would be formed for the acquisition of the shares of PTK. Rather, when its offer was accepted, the Consortium's status changed, moving from that of a "Bidder" to that of the "Selected Bidder." There was no other purpose for the binding offer. Its acceptance merely enabled the Bidder to move to the next step, that of Selected Bidder (or, as Axos itself seemed to have put it, a status that allowed it to work on "an exclusive basis" in the further course of the tender process<sup>151</sup>), not to conclude the SPA. As a result, it does not qualify as an offer within the meaning of the Kosovo Law on Obligations which would be "*such that through the acceptance thereof a contract could be concluded*".<sup>152</sup>
- ii. The 18 April 2013 letter by Kosovo was not an acceptance either
172. If the bid submission is not an offer, it necessarily follows that the 18 April 2013 letter cannot be an acceptance either. But even irrespective of the qualification of the 3 April 2013 letter, the selection by Kosovo of the first-ranked Bidder by letter dated 18 April 2013 still did not constitute an acceptance. It was what it was meant to be under the ITP, namely, the choice of the "Selected Bidder."<sup>153</sup> Axos drew considerable attention to the letter dated 18 April 2013 sent by the GPC to Mr. Jan Budden and communicated to the same by email from the Transaction Advisors.<sup>154</sup> This, however, is only one document evidencing Kosovo's selection of the Axos/Najafi Consortium as the Selected Bidder.
173. Kosovo claims for its part that the official document is not this letter, but rather the publication in the official Kosovo Gazette on 24 April 2013, which constitutes the official selection of the Bidder.<sup>155</sup>
174. Be that as it may, the Tribunal has to examine whether, interpreted against the background of all relevant documents, the letter of 18 April 2013 can be characterized as an acceptance of a putative offer by the Consortium to purchase 75% of the shares of PTK for EUR 277 million.

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<sup>151</sup> **Exhibit C-111, R-68**, p. 5.

<sup>152</sup> Article 22.1, **Exhibit C-35**.

<sup>153</sup> **Exhibit C-7**.

<sup>154</sup> **Exhibit C-12**. See also Tr. Day 1, 150:21-153:23.

<sup>155</sup> **Exhibit C-115**. See also Respondent's Counter-Memorial, ¶ 61.

175. At this juncture it is helpful to reproduce the contents of this letter in full:

*Thank you for participating in the above-mentioned public tender. The procedure has been conducted in accordance with the applicable Law, including but not limited Kosovo Law No. 03/L-087 on Publicly Owned Enterprises and with Kosovo Law No. 04/L-045 on Public- Private-Partnerships.*

*Your bid has been thoroughly evaluated according to the conditions and requirements given in the Instructions for Tender Participants (ITP) document which was issued based on the aforementioned laws.*

*In accordance with the Instructions for Tender Participants, the Contacting Authority has treated the highest offered Purchase Price to be the economically most advantageous offer. We have the pleasure to inform you that you have submitted the highest Purchase Price as a reply to the Instructions for Tender Participants for the above-mentioned procurement activity.*

*The contract has been awarded to you with the price specified in your Financial Bid and in compliance with the terms and condition of the Instructions for Tender Participants.*

*The contract award is provisional and does not constitute a contractual arrangement until the interval has elapsed during which unsuccessful tenderers can seek a review of the decision.<sup>156</sup>*

176. The first observation of the Tribunal is that this letter must be understood in the context of the ITP. This conclusion derives from the wording of the letter itself: there are no less than four express references to the ITP in this six-paragraph letter.
177. It is therefore clear that the letter is to be interpreted as constituting a milestone in the timetable set out in the schedule found at Article 2 of the ITP. More precisely, this letter constitutes the “*Selection of [the] first-ranked Bidder*”.<sup>157</sup>
178. The letter itself does not say otherwise. It informs the Consortium that its bid “*has been thoroughly evaluated*” in accordance with the ITP, that this bid contained “*the highest Purchase Price*” and

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<sup>156</sup> Exhibit C-12.

<sup>157</sup> Exhibit C-7, p. 6.

that, accordingly, “*the contract has been awarded to [the Consortium] with the price specified in [its] Financial Bid and in compliance with the terms and condition*” of the ITP.<sup>158</sup>

179. Read in the context of the ITP, therefore, it is very difficult to understand this letter as being anything other than a document which informed the Bidder of its change in status, i.e., that its bid has been selected. It is in particular very difficult to interpret this letter as an acceptance of an offer to buy shares. There is no reference to such an offer and there is no reference to an acceptance. The Tribunal observes that a declaration by Kosovo at that stage giving its binding acceptance of an offer to buy shares would have substantially deviated from the tender procedure as foreseen in the ITP. The 18 April 2013 letter does not allow such a construction. Indeed, the letter emphasised that the notification was clearly made within the framework of the ITP, stating that “[t]he contract has been awarded to you ... in compliance with the terms and conditions of the Instructions for Tender Participants” (emphasis added).<sup>159</sup>
180. Axos places particular emphasis on the last sentence because it suggests that once the interval in question elapsed the “contract award” must constitute a “contractual arrangement”.<sup>160</sup> (The last sentence reads as follows: “*The contract award is provisional and does not constitute a contractual arrangement until the interval has elapsed during which unsuccessful tenderers can seek a review of the decision*”<sup>161</sup>).
181. The Tribunal accepts that Axos’ reading is plausible. But the interpretation founders on a specific question, namely, *what* “contractual arrangement” was contemplated here?
182. It is clear to the Tribunal that, whatever the term “contractual arrangement” after the expiry of the challenge period may have been intended to mean, it could not and did not mean the conclusion of the SPA. This is because the letter refers expressly to the ITP which, in turn, provides that the signature of the SPA was a step subsequent to the selection of the Selected Bidder.

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<sup>158</sup> Exhibit C-12.

<sup>159</sup> Exhibit C-12.

<sup>160</sup> Claimant’s Memorial, ¶¶ 364-365; Claimant’s Reply, ¶ 126.

<sup>161</sup> Exhibit C-12.



183. This is also confirmed by the definition of the term “Award” found in the ITP. According to the ITP, “award” means “*the act of legally bestowing the status of Selected Bidder to a Bidder in accordance with the eligibility and evaluation criteria set forth in the IPQ and ITP*”.<sup>162</sup> And the term “Selected Bidder” is defined as “*a Bidder who has received the Award and has been invited by the Contracting Authority to enter into the Transaction Documents*”.<sup>163</sup> And if, as the ITP makes clear, the Selected Bidder failed to enter into the contract, the legal consequence was only a right to demand the security provided from the Selected Bidder and to award the Tender to the Second Ranking Bidder.
184. While the Tribunal can follow Axos’ argument insofar as that it accepts that the last sentence of the 18 April 2013 letter is ambiguous, it disagrees, however, with Axos’ position that this sentence could be construed to mean that Kosovo declared its acceptance to sell the shares. When that sentence is read in the context of the whole letter and within the framework of the ITP (to which this letter repeatedly refers), Axos’ proposed reading finds no support.
185. The Tribunal also notes that, upon receipt of this letter, the Consortium did not react specifically and did not claim at the material time that a contract for the purchase of shares of PTK was formed following the lapse of the time interval provided for in the letter of 18 April 2013. The Tribunal further observes that the contract was said to have been awarded “*with the price specified in [the] Financial Bid*”<sup>164</sup> and that this price was itself contingent on the absence of debt as at the closing.
186. The 18 April 2013 letter is therefore not an acceptance of an offer to purchase 75% of the shares of PTK. It is a letter informing the Consortium that it has been chosen as the Selected Bidder under the ITP, nothing more.

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<sup>162</sup> Exhibit C-7, p. 2. Emphasis added.

<sup>163</sup> Exhibit C-7, p. 4. Emphasis added.

<sup>164</sup> Exhibit C-12.

iii. Axos alone cannot avail itself of the rights, if any, belonging to the Consortium formed by Axos and Najafi

187. The Claimant is this arbitration is Axos and Axos alone. According to Axos, a protected investment would arise from the rights acquired by the Selected Bidder following its selection as such.
188. Assuming *arguendo* that such rights exist and regardless of the nature and scope of these rights, the rights of the Selected Bidder belonged to the Consortium formed by Axos and Najafi, not to Axos alone.
189. It is not in dispute that the bid submission was made by the Consortium.
190. The detailed Bid Document defines the “Consortium” as follows: “*The consortium (“Consortium”) composed of ACP Axos Capital GmbH (“Axos”), Najafi Companies (Najafi)*”<sup>165</sup>. The cover page of the Financial Bid identifies ACP Axos Capital GmbH as the “*Consortium Lead Member*” and Najafi Companies as the “*Consortium Member*”.<sup>166</sup>
191. Similarly, it is not in dispute that the privatization contract was awarded to the Consortium comprising Axos and Najafi. The Contract Award Notice of 24 April 2013 indicates that the contract has been awarded to “*ACP Axos Capital GmbH in Consortium with Najafi Companies LLC*”.<sup>167</sup>
192. The Selected Bidder was therefore the Consortium Axos/Najafi, not Axos alone. Whatever rights are attached to the status of a Selected Bidder those rights belonged to the Consortium, not to Axos alone.
193. The Claimant’s expert, Dr. Plavšak, expressly confirmed this point during cross-examination at the hearing:

*A. Yes, but their offer was a joint offer: we two, together, offer to buy you 75% of shares.  
[...]*

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<sup>165</sup> Exhibit C-111, p. 1.

<sup>166</sup> Exhibit R-60, p. 1.

<sup>167</sup> Exhibit C-115, Section IV.4.

*A. If it was one offer then you would have to – because they were -- 75% of shares is the subject of sale, and they gave a joint offer, by which they became joint creditors. It's a term, it's a position of joint creditors, two or more persons having the same right, proprietary right. So they can only exercise it jointly.<sup>168</sup> (emphasis added)*

194. By accepting that these rights can “only” be exercised jointly, Dr. Plavšak admitted by the same token that they cannot be exercised unilaterally by Axos. Further, Axos did not claim that it was the legal successor to the Axos/Najafi Consortium or that the rights of the Consortium were transferred to it by way of assignment or any other legal mechanism.

195. It follows that Axos cannot avail itself of the rights of the Axos/Najafi Consortium in this arbitration. This finding is fatal to Axos’ jurisdictional theory regardless of the other reasons leading to the dismissal of this case.

iv. There could be no contract prior to the signing of the SPA because Kosovo retained the unfettered right to cancel the privatization until that date

196. Regardless of the issue of the identity of the Claimant, the Tribunal is also convinced that no contract between the Selected Bidder and Kosovo could have arisen prior to the signing of the SPA for a further reason. That is, as has been acknowledged by all Parties, and their experts, that Kosovo was entitled to call off the privatization process at any time prior to the signing of the SPA. It is thus difficult to conceive of a contract when one party only is bound, the Selected Bidder, but not the other party, Kosovo. Not only could Kosovo cancel the privatization at any time, but at the time of the making of their bids, all bidders accepted that no indemnification would be due.

197. This is provided in unambiguous terms by the ITP, at Article 1.1:

*The Contracting Authority further reserves the right to cancel the Tender or declare it void or otherwise without effect either in relation to the entire Tender or in relation to an individual Bidder, for any reason whatsoever, until the signing of the Transaction Documents, and that such action does not entitle the Bidder/Selected Bidder to any claim whatsoever against the GPC, the GoK, or any of their respective agents, representatives, advisors or consultants.*<sup>169</sup>

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<sup>168</sup> Tr. Day 4, 46: 16 to 47:3.

<sup>169</sup> **Exhibit C-7**, Article 1.1.

198. The negotiating history leading up to the bid submission reveals that Axos attempted to amend that provision and Mr. Budden was aware of Kosovo's refusal to agree to such an amendment.<sup>170</sup>

Mr. Budden confirmed the right of cancellation during cross-examination at the hearing:

*Q. Again, you were aware that Kosovo reserved the right to cancel the tender or declare it void without effect either in relation to the entire tender or in relation to an individual bidder for any reason whatsoever until the signing of the transaction documents; right?*

*A. Yes, but these -- these are standard documents, you don't argue. Right? You just take them, you know there's the process, you get the -- and you just sign it. It's more of an administrative issue. At least that's how I did -- put this.*

*Q. So your view is these are standard words that don't necessarily -- (overspeaking)*

—

*A. Standard words that use copy and paste from other transactions and, you know ...*

*Q. Right. But they, in your view, don't have any legally binding effect on you?*

*A. Of course they do.*<sup>171</sup> (emphasis added)

199. The Claimant's expert, Dr. Plavšak, also testified that she understood Article 1.1 as giving Kosovo an unfettered right to cancel the privatization at any time:

*THE PRESIDENT: So can I summarise your opinion as being that that cancellation right applies until the SPA is entered into?*

*A. Yes.*

*THE PRESIDENT: Regardless of the form of the way it's entered into?*

*A. Yes.*<sup>172</sup>

200. The existence of this cancellation right calls into question the very notion that a contract could be entered into when a Bidder is selected. Clearly, the Bidder was bound by its offer and must proceed in accordance with the various steps of the ITP, but its putative counterparty, the Government,

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<sup>170</sup> Tr. Day 2, 6:21 and 10:17-19. See also **Exhibit R-57**.

<sup>171</sup> Tr. Day 1, 295:21 to 296:2.

<sup>172</sup> Tr. Day 4, 109:17-25.

enjoyed different rights. Under the ITP, the Government could cancel the process at any time until the signing of the Transaction Documents and the Bidder had no remedy whatsoever. This is hardly a contract where both Parties are bound. Rather, it is a unilateral process that the Government can, until the very last moment, discontinue at will. The language of the ITP, which allowed for Kosovo's "*right to cancel the Tender [...] until the signing of the Transaction Documents*"<sup>173</sup> indeed further strengthens the conclusion that only with the signing a contract with mutual rights and duties came into being and that up until that point, Kosovo was not bound in any way.

201. During the hearing, Axos sought to challenge the discretionary nature of Article 1.1 of the ITP by relying on Kosovan case law. More specifically, Axos relied on a decision of the Special Chamber of the Supreme Court, dated 10 September 2015.<sup>174</sup>
202. The Tribunal is not convinced by this argument. First, the decision of the Special Chamber of the Supreme Court is a decision on a preliminary injunction, not a decision on the merits of the underlying right. Second, it is unclear whether the bid documents in the case referred to the Supreme Court were drafted in terms identical to Article 1.1 of the ITP. When cross-examined on this, Professor Qerimi denied that the bid documents were the same, a proposition with which counsel for the Claimant disagreed.<sup>175</sup> Professor Qerimi was then asked to assume that the bid documents were the same:

*Q. A right of cancellation under a tender procedure can only be exercised once the tenderer has been informed of that decision and reasons have been provided; do you accept that?*

*A. You know, in this case I can't accept what is in the relevant applicable rules of tender because –*

*Q. If it were not, I'm going to ask you for an assumption again, Professor Qerimi.*

*A. That's -- yes, that's an assumption.*

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<sup>173</sup> Exhibit C-7, Article 1.1.

<sup>174</sup> Qerimi-18 pp. 137 et seq., see Tr. Day 4, 198:13 to 210:13.

<sup>175</sup> Tr. Day 4, 200 to 205.

*Q. Yes. So if it were not, would you accept that this decision of the court influenced your view?*

*A. But that's an assumption, right?*

*Q. It is.*

*A. Hypothetically?*

*Q. I'm asking you for that assumption.*

*A. Can I abstain from responding to the questions with assumptive content?*

*THE PRESIDENT: I believe the assumption is, and you will correct me if I am wrong, that the relevant provision which enables the authority, privatisation authority, to cancel are the same. And if the relevant provisions were the same, would this decision provide guidance? I think that's the question put to you, and I don't think it's an unfair question.*

*A. Yes, if the procedures were the same they will certainly provide guidance.<sup>176</sup>*

203. As a result, the Tribunal notes that the relevance of that case to the present arbitration has remained vague and it finds that not much can be derived from it. The ITP, for its part, is unambiguous and it was expressly accepted by all bidders, including the cancellation right contained therein.

204. The continuing existence of the cancellation right is another reason why Axos' jurisdictional theory fails regardless of the issue of the identity of the Bidder. Even if the Selected Bidder was the Claimant, which is plainly not the case, the Tribunal would not be convinced that a valid contract had been entered into with the selection of this Bidder as a Selected Bidder.

v. No contract was entered into because the requirements of Kosovar Public Law on the identity of the Government's signatory were not satisfied.

205. Irrespective of the above, there is another reason why no contract could have been validly formed at the time of the selection process, namely that the mandatory requirements of Kosovar public law have not been complied with.

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<sup>176</sup> Tr. Day 4, 209:7 to 210:7.

206. Kosovo has offered convincing evidence on this aspect with the testimony of Professor Qerimi and the relevant Kosovo statutes. Axos has challenged the interpretation of the Kosovo statutes and case law but has not provided expert evidence on this aspect. Dr. Plavšak readily agreed under cross-examination that she was no expert of Kosovar public law and that she did not offer evidence on this issue:

*Q. And are you an expert in Kosovar Public Law?*

*A. No.*

*Q. Are you an expert in the Law on Publicly Owned Enterprises of the Republic of Kosovo?*

*A. No.*

*Q. Did the Law on Publicly Owned Enterprises apply to the privatisation of PTK?*

*A. I can't answer that question because I am not an expert on Kosovo law and I was not requested to analyse the provision of Kosovan law. On any public Kosovan laws.<sup>177</sup>*

207. This is also apparent from Dr. Plavšak's expert reports, which show that she reasoned by analogy with Slovenian law. Thus, in her first expert report, Dr. Plavšak stated:

*3. Based on the comparison described above I can confirm that the provisions of the Kosovo LOR, relevant to the subject matter of the Dispute, are not only substantially the same as the relevant provisions of the former Yugoslav ORA, but are also formulated using practically the same wording and the same structure (chapters, sections etc.)*

*4. The provisions of the Slovenian OC are also substantially the same when compared to the former Yugoslav ORA. Comparison of the Kosovo LOR (which was adopted in 2012) with the Slovenian OC (which was adopted in 2002, i.e. ten years earlier) shows that the Kosovo LOR was also modeled on the Slovenian OC. I base this conclusion on the comparison of the following Articles adopted in Slovenian OC which were not contained in the former Yugoslav ORA and were adopted in the Kosovo LOR, e.g.: [...]<sup>178</sup>*

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<sup>177</sup> Tr. Day 4, 15:16-25.

<sup>178</sup> First Expert Report of Nina Plavšak, p. 6.

208. By contrast, Professor Qerimi is an expert on Kosovar public law. As he explained in his first expert report:

*I am a University Professor at the University of Prishtina Faculty of Law. The University is the oldest and largest public institution of higher learning in the country. I joined the Faculty of Law in 2006. First, as a research and teaching assistant, then as a lecturer and, as of 2011, was promoted to the professorial rank. My expertise and teaching experience lie within the public domain of the study of law, including from an international perspective.*<sup>179</sup>

209. Professor Qerimi explained convincingly at the hearing that three distinct Kosovar statutes applied cumulatively to the proposed privatization transaction, Law No. 03/L-087 on Publicly Owned Enterprises (“Law on PoEs”), Law No. 04/L-045 on Public-Private-Partnership (“Law on PPP”), and Law No. 04/L-042 on Public Procurement:

*So these three laws have the special and mandatory character in relation to this arbitration, so the law on POEs, the law on PPP and the Law On Public Procurement regulate cumulatively different aspects of the tendering negotiations and then formation of contractual relationships stemming from the privatisation public procedure. So these three laws constitute the body of relevant public laws, (1) and (2) you have *lex specialis* character.*<sup>180</sup>

210. During the cross-examination of Professor Qerimi, Axos did not really challenge the applicability of these statutes. Rather, Axos challenged the hierarchy of norms under Kosovar law and whether those three laws were *lex specialis* or *lex generalis* as compared to the Law on Obligations.<sup>181</sup> There is therefore no serious dispute that these laws apply in principle.

211. The Tribunal is not convinced that the Law on Obligations can trump the Law on PoEs, the Law on PPP and the Law on Public Procurement as a general proposition. These laws have clearly distinct scopes of application and are sensibly applicable to different aspects of the process of privatizing of State-owned assets and the Tribunal has not identified any reason why they should not be applied cumulatively in their respective scope of application.

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<sup>179</sup> First Expert Report of Qerim Querimi, p. 1.

<sup>180</sup> Tr. Day 4, 113:13-21.

<sup>181</sup> Tr. Day 4, 133 *et seq*, esp at 140, 141.



212. It is possible, therefore, that certain specific provisions of the Law on PoEs, Law on PPPs or the Law on Public Procurement impose certain additional requirements on the Government in defined circumstances. Again, this is not necessarily in contradiction with the Law on Obligations but merely an additional requirement that applies to the Government only in situations that each law defines.
213. One such provision is Article 50 of the Law on PPPs. Article 50 provides that the “Agreement” is to be signed by the “highest representative of the contracting authority”: “*The Agreement shall be signed by the authorized representative of the Private Partner and the highest representative of the Contracting Authority.*”<sup>182</sup>
214. The experts for both Parties have accepted that this provision applies to the contemplated privatization contract.
215. Professor Qerimi opined on this in his written expert reports<sup>183</sup> and confirmed it at the hearing in the following terms:

*In my view, it is especially relevant that the letter in the first place mentions the basis upon which the procedure has been conducted. And it, using again, “including but not limited” refers to the law on POEs and the law on PPP. So, in my view, this is the first relevant factor, and the law on PPP requires different procedures. For instance, we can note the difference with the form used by the GPC in the case of the award notice. And this is, as far as I can see, a typical public procurement form, but not the one that derives from the Law On Public-Private Partnerships.*

*It is very significant to me that the letter is signed -- I believe I don't see a signature here, but here we have the name of a procurement officer, whereas the law that this letter refers to, the law on PPP, Article 50, requires that the signature is from the highest representative of the contracting authority, which, in this case, is the minister who chairs the Government Privatisation Committee.*<sup>184</sup>

216. At the hearing, Dr. Plavšak concurred during cross-examination that the signatory to the 18 April 2013 letter was not the highest representative of the public authority:

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<sup>182</sup> Exhibit C-36.

<sup>183</sup> First Expert Report of Qerim Querimi, ¶ 70 (footnote references omitted).

<sup>184</sup> Tr. Day 4, 179:2-20.

*Q. And therefore, from a purely contractual perspective, if this letter were supposed to be acceptance, written acceptance of a written offer, for it to be valid it would have to be signed by the highest representative of the public authority; correct?*

*A. By the person authorised under the Kosovan public law to represent Republic of Kosovo.*

*Q. And the public law applicable in this case is Article 50 of the PPP law, which requires the highest representative of the public authority; correct?*

*A. Yes.*<sup>185</sup>

217. There is therefore no dispute among the experts that, in order to constitute a valid acceptance, the letter of 18 April 2013 had to be signed by the “highest representative” of the Government of Kosovo.
218. It is not disputed either that this letter was signed by Mr. Selami Berisha, a procurement officer at the Ministry of Economic Development. Mr. Berisha is plainly not the “highest representative” of the Ministry of Economic Development. Presumably, the Minister chairing the GPC himself would be that person (this is what Professor Qerimi opined<sup>186</sup>) or any person that would act with delegated authority from the Minister. It has not been argued, and no evidence in that regard is on record, that Mr. Berisha was acting upon delegated authority of the Minister to conclude a privatization agreement.
219. It follows that the letter of 18 April 2013 was incapable of constituting a valid acceptance from a Kosovar public law perspective. This reason too leads to the rejection of Axos’ jurisdictional theory.

vi. The conduct of the Parties following the bid selection confirms that no binding contract was entered into as of April 2013.

220. As a final matter on this issue, the Tribunal turns to the conduct of the Parties after the bid selection. It is not in dispute that, under Kosovar law, the parties’ conduct after a contract is concluded is

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<sup>185</sup> Tr. Day 4, 71:8-18.

<sup>186</sup> Tr. Day 4, 179:17-20.

relevant for contract interpretation. Axos' expert, Dr. Plavšak, eventually acknowledged this during the hearing:

*THE PRESIDENT: Do [the courts in Kosovo] also look at the correspondence exchanged between the parties after concluding the contract?*

*A. Not in the meaning of interpretation of the contractual provisions.*

*THE PRESIDENT: Why not? Because many common legal civil law systems do that: they look at what the parties did and they try to ascertain their intentions based on their performance of the contract.*

*A. But not for the interpretation of the contract.*

*THE PRESIDENT: I'm asking you why not. Is it impermissible as a matter of law?*

*A. No.*

*[...]*

*THE PRESIDENT: And would your answer be different if both parties in the letter had referred to a specific provision of the contract, purporting to applying it? Both parties say: Article 5. One says Article 5 contains an exclusivity provision. The other says: yes, but it works differently. And Article 5 does not contain an exclusivity provision, but both parties seem to agree that there is a –*

*A. Yes, in that case it would be relevant for the interpretation because in that case the only relevance of the dispute, of concentration of the dispute, would be how it applies. Because they both agree it contains the exclusivity.<sup>187</sup>*

221. The Tribunal sees no practical difference between the situation where one looks at the conduct of the parties to interpret an existing contract and the situation where one looks at the conduct of the parties to decide whether a contract was concluded in the first place.
222. In both cases, the goal is to ascertain the real intentions of the parties and to check the consistency of their legal position (i.e. whether a contract was concluded or not) against their subsequent conduct.

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<sup>187</sup> Tr. Day 4, p. 102, 1-20 to p. 104, 1-24.

223. In any event, the Tribunal understands Dr. Plavšak's position to be that in order to ascertain whether or not a contract has been concluded, the parties' subsequent conduct is relevant. In the present case the Parties are indeed in dispute as to whether a contract has been entered into. So following Dr. Plavšak's testimony, the Parties' subsequent conduct is relevant and will thus be taken into consideration.
224. In the instant case, for example, one would have expected Axos to claim immediately that it had an enforceable contract if Axos was genuinely convinced that a contract had been entered into with the exchange of 3 April 2013 and 18 April 2013. At the very least, one would have expected Axos to mention the existence of this contract. In particular, if Axos believed that it had a binding contract in April 2013, it would have immediately signed the Transaction Documents, or at least offered to do so.
225. The record shows that Axos did not do so. It eventually offered to sign the Transaction Documents, but four months later, on 13 August 2013, in circumstances that the Tribunal will discuss later.<sup>188</sup>
226. In the meantime, Axos actively sought to negotiate the terms of the Transaction Documents which, by the time of the Bidder Selection were supposed to be fixed. There were various episodes in this negotiation and the Tribunal need not review them in detail. Suffice it to say that, in June and July 2013, Axos engaged in attempts to extensively renegotiate the terms of the Transaction Documents.
227. According to Mr. Budden's written evidence, the stated purpose of this renegotiation was to "*bring them in line with international standards.*"<sup>189</sup>
228. Whatever the reason for these requested changes, they were significant.
229. On 12 June 2013,<sup>190</sup> Axos sent a mark-up of the Transaction Documents which contemplated a complete restructuring of the proposed transaction. Instead of buying 75% of the shares of PTK, as contemplated in the Transaction Documents, the Consortium would buy 100% of PTK, then

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<sup>188</sup> **Exhibit R-35.** See below at para. 237 *et seq.*

<sup>189</sup> First Witness Statement of Jan Budden, ¶ 145.

<sup>190</sup> **Exhibit R-34.**

merge with it, at which point 25% of the shares would be sold to the Government. This was explained in a “Drafter’s Note” in the mark-up as follows:

*Drafter’s Note: This draft has been prepared on the basis that a ‘traditional LBO’ acquisition-finance structure (followed by a post-completion merger) will be deployed whereby the GoK will sell 100% of the share capital of PTK to the Bidder and then re-invest a proportionate amount of such sale proceeds into the Bidder so as to acquire a 25% stake therein; promptly after Completion a merger of the Bidder and PTK will take place, following which the Bidder will directly own 75% of PTK and the GoK will own 25% of PTK (and be able to participate in and benefit from the leverage introduced by way of the relevant acquisition debt finance).<sup>191</sup>*

230. The net effect of such structure is to transfer the debt of the Bidder at the level of the target company and to have the Government bear 25% of it. This, by any measure, is not an insignificant change.
231. Subsequently, on 4 July 2013, Axos sent an 8-page letter to the Transaction Advisors where it sought to justify a number of other requested changes.<sup>192</sup> This letter refers in its first sentence to the “on-going privatization process” and makes multiple references to the “Proposed Transaction” thereby suggesting that in the drafter’s mind the transaction was not yet concluded.
232. The letter also requested a side-agreement enabling the Consortium to exit the proposed transaction in the event that the lenders to the Bidder would themselves withdraw from the proposed transaction:

*In recognition thereof, we would like to see the Government agree, by way of a side letter, to permit the termination of the Transaction Documents (and return to the Consortium the completion security bond) in the event that the Lenders terminate their funding commitments with the Consortium I BidCo at any time prior to Closing. We believe that such a finance contingency is balanced and that it is not fair or equitable to penalize a purchaser relying on third-party debt financing for exposing itself to a risk, which derives from third parties over whom neither the seller nor the buyer has any control.<sup>193</sup>*

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<sup>191</sup> Exhibit R-34.

<sup>192</sup> Exhibit C-125.

<sup>193</sup> Exhibit C-125, p. 3.

233. At the hearing, Mr. Budden confirmed that the intention was indeed for the Consortium to have a way out in circumstances where the financing would no longer be secured:

*THE PRESIDENT: I realise that, but what you are saying, if I'm not mistaken, is that: if the financing parties, what you call exactly the lenders – [withdraw] -- terminate their funding commitments with the consortium, we want to be able to terminate the deal. That's how I read it, but if you mean something –*

*A. No, yes, this is correct.*<sup>194</sup>

234. According to the 4 July 2013 letter, this requested change, among others, was characterized by the Consortium as a “must have” for the transaction to be concluded:

*We should point out that the following list is not a ‘wish list’. but is a very narrowly tailored list of specific ‘must haves’ in order to conclude the Proposed Transaction...*<sup>195</sup> (emphasis in original)

235. At the hearing, Mr. Budden also conceded that the requested changes were imperative for the transaction to be concluded:

*Q. But what you're conveying -- what you are officially conveying is: these are must-haves in order to conclude a proposed transaction which means if we don't get them, we don't have to conclude the proposed transaction.*

*A. Yes, one thing is what you write down, the other thing is of course something to sit down and find a solution.*<sup>196</sup>

236. Such a request, which would lead to the Consortium not being bound to buy the PTK shares if financing was not certain, is difficult to reconcile with the Claimant's argument in the present proceeding that a binding agreement was already concluded for the purchase of 75% of PTK.

237. In further confirmation of this finding, the Tribunal notes that, approximately a month later, on 13 August 2013, Axos changed its position and indicated that it was ready to “*sign the transaction*

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<sup>194</sup> Tr. Day 2, 250:10-16.

<sup>195</sup> **Exhibit C-125.**

<sup>196</sup> Tr. Day 2, 154:25 to 155:5.

*documents in the form they are initialized by us as part of our binding bid dated April 3rd 2013...*”<sup>197</sup>

238. Notably, Axos did not refer to an already concluded agreement, but only to its “binding bid”.
239. Further, the Tribunal is not convinced that this 13 August 2013 proposal was anything more than a new negotiating position, for two reasons.
240. First, at that time, unbeknownst to Kosovo, Najafi had long since withdrawn from the Consortium. It is established that Najafi sent a withdrawal letter to Axos on 24 April 2013.<sup>198</sup> It is also established that Axos did not inform Kosovo immediately of this withdrawal but waited at least until the end of August 2013 to inform it of this fact.<sup>199</sup> The Claimant attached much weight on the identification of the shareholding of the SPV, Axos Telecom B.V., sent by Axos to Kosovo at the end of August 2013, because that document showed that the Netherlands incorporated SPV was a wholly-owned subsidiary of Axos and no shareholding was to be held by Najafi.<sup>200</sup> According to Mr. Budden and Mr. Robert Woog, the Transaction Advisors were also informed orally of Najafi’s withdrawal at a conference call held on or about 30 August 2013.<sup>201</sup> Kosovo denies this, pointing out that, even after August 2013, Axos itself made multiple references to the Consortium with Najafi which Kosovo considers misleading.<sup>202</sup> Kosovo notes further that the responsible Minister, Mr. Ismajli, made a statement to the Assembly in September 2013 when the privatization was discussed in which he referred to the Consortium’s comprising two parties, one being American, and also during that time the GPC stated that it remained “committed to entering

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<sup>197</sup> **Exhibit R-35.**

<sup>198</sup> **Exhibit R-46.**

<sup>199</sup> At various times during his cross-examination, Mr. Budden acknowledged that this was a “delicate” issue that could have caused “extra trouble” if disclosed to Kosovo because he was aware that certain political parties had doubts about Axos’ ability to run the privatized telecoms company and were strongly challenging the award of the bid to it. Tr. Day 2, 136, 18 and 158, 15.

<sup>200</sup> Tr. Day 1, 27:16 to 22.

<sup>201</sup> Tr. Day 2, 156:23 to 157:5; 159:1-14; and 337:18 to 338:1.

<sup>202</sup> Tr. Day 2, 156-159.

into a long-term mutually beneficial relationship with Axos and Najafi”.<sup>203</sup> Mr. Budden acknowledged that the government wanted an “American/European group”.<sup>204</sup>

241. The Tribunal need not decide if or when Kosovo’s decision-makers became aware that Najafi was no longer participating in the Consortium. What is abundantly clear, even accepting Axos’ account of the facts, is that on 13 August 2013, Najafi had long since withdrawn from the Consortium and that the Consortium that submitted the Bid was no longer in a position to execute the Transaction Documents.
242. Second, and this is linked to the previous finding, the SPV that was supposed to execute the Transaction Documents, was not even incorporated before the end of August 2013.<sup>205</sup> It was therefore not in a position to execute the Transaction Documents two weeks earlier, had Kosovo decided to accept this new buyer in lieu of the original consortium.
243. The discussions continued thereafter until Kosovo decided to put an end to the process at the end of 2013. These events are however not relevant for the Tribunal’s jurisdiction under Axos’ main jurisdictional theory.
244. What matters is that the events that took place in the summer of 2013 are incompatible with the notion that a valid binding contract for the sale of 75% of the share of PTK had been entered into in April 2013, which is Axos’ main jurisdictional theory.
245. Independently of the multiple hurdles from a strict legal perspective that Axos fails to clear, its theory is also not supported by the facts of the case.

### 3. Axos’ Alternative Jurisdictional Theory

246. Axos’ alternative jurisdictional theory underlying its contention that it has a protected investment within the meaning of Article 1(1) of the Treaty is based on Article 1(1)(c) of the Treaty which provides that “claims for money” are protected investments.

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<sup>203</sup> Tr. Day 2, 337:1-15.

<sup>204</sup> Tr. Day 2, 302:7.

<sup>205</sup> **Exhibit C-136.**



247. According to Axos, “it is the sums spent (and know-how contributed) by Axos in connection with the Contract which constitute ‘[c]laims to money’”.<sup>206</sup>
248. This argument is rather difficult to follow insofar as Axos has not indicated what the basis of its purported “claims for money” would be.<sup>207</sup> As presented by Axos, this argument seems to imply that it is its claim under the Treaty which constitutes its investment.
249. The Tribunal does not need to engage in an extensive discussion as to what type of claims would be protected under the language of the Treaty, but one thing is clear: it cannot be a claim under the Treaty itself. Otherwise, the definition would be circular and would result in the paradoxical situation that it would suffice for a claimant to advance any claim under a bilateral investment treaty containing this language to subsequently claim that it has a protected investment.
250. The “[c]laims to money” phrasing referred to in Article 1(1)(c) of the Treaty must therefore have a basis other than the Treaty itself. This basis may be contractual, tortious, statutory, regulatory or otherwise, but it cannot be only the Treaty itself.
251. In the instant case, Axos has not advanced any basis at all. Moreover, a claim for the wasted expenses for the bid, as this alternative claim is, would, whatever its legal basis, be expressly barred by the clear language of the ITP, which provides:

*The Contracting Authority reserves the right to change the time schedule and, generally, any terms of these ITP. The Contracting Authority further reserves the right to cancel the Tender or declare it void or otherwise without effect either in relation to the entire Tender or in relation to an individual Bidder, for any reason whatsoever, until the signing of the Transaction Documents, and that such action does not entitle the Bidder/Selected Bidder to any claim whatsoever against the GPC, the GoK, or any of their respective agents, representatives, advisors or consultants.*<sup>208</sup> (emphasis added)

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<sup>206</sup> Claimant’s Reply, ¶ 167.

<sup>207</sup> See Claimant’s Rejoinder, Section 3.1.2.

<sup>208</sup> Exhibit C-7, Article 1.1.

252. The Tribunal notes that Axos' own expert agreed at the hearing, and rightly so in the opinion of the Tribunal, that the cancellation right contained in the ITP continued to apply until the SPA was entered into.<sup>209</sup> There is no reason for this provision to be treated differently.
253. As a result, it is clear that there is no discernible basis for Axos' claim for wasted expenses. This may also explain why this alternative jurisdictional theory was not really pursued at the hearing.
254. In the end, the Tribunal can only conclude that there is no basis for the Article 1(1)(c) "[c]laims for money" claim and such claim would in any event be barred by the express terms of the ITP.
255. As a result, Axos' alternative jurisdictional theory also fails.
256. Because the Tribunal concludes that there is no investment under the BIT, there is no need for the Tribunal to address the issue whether there is an investment for the purpose of the ICSID Convention (on the assumption that this is a separate requirement, an issue that the Tribunal needs not address here) nor is there a need to address the merits of the claim.

#### **IV. COSTS OF THE ARBITRATION**

257. Turning to the costs of the arbitration, Article 61(2) of the ICSID Convention provides that the Tribunal shall, except if the parties otherwise agree, assess expenses incurred by the parties and decide how and by whom those expenses should be paid:

*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.*

258. Article 61(2) consequently confers a broad discretion on the Tribunal to decide how and by whom costs are to be borne (subject always to its consideration of whether particular costs were reasonably incurred).

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<sup>209</sup> Tr. Day 4, 109:17-23.

259. Further, Rule 28 of the ICSID Rules of Procedure for Arbitration Proceedings provides that each of the parties should submit to the Tribunal a statement of costs reasonably incurred or borne by it in the proceeding:

*(1) Without prejudice to the final decision on the payment of the cost of the proceeding, the Tribunal may, unless otherwise agreed by the parties, decide:*

*(a) at any stage of the proceeding, the portion which each party shall pay, pursuant to Administrative and Financial Regulation 14, of the fees and expenses of the Tribunal and the charges for the use of the facilities of the Centre;*

*(b) with respect to any part of the proceeding, that the related costs (as determined by the Secretary-General) shall be borne entirely or in a particular share by one of the parties.*

*(2) Promptly after the closure of the proceeding, each party shall submit to the Tribunal a statement of costs reasonably incurred or borne by it in the proceeding and the Secretary-General shall submit to the Tribunal an account of all amounts paid by each party to the Centre and of all costs incurred by the Centre for the proceeding. The Tribunal may, before the award has been rendered, request the parties and the Secretary-General to provide additional information concerning the cost of the proceeding.*

260. In accordance with the Tribunal's directions, the Parties filed Submissions on Costs on 13 December 2017 followed by Reply submissions on 20 December 2017.

261. Axos submits that it has incurred the following costs in connection with this arbitration:

Description	Total incurred (EUR)
Herbert Smith Freehills fees	2,509,248.00
Herbert Smith Freehills disbursements	288,289.30
Freshfields Bruckhaus Deringer fees	15,000.00
Freshfields Bruckhaus Deringer disbursements	1,744.15
Dr. Nina Plavsak fees	48,100.00
Dr. Nina Plavsak disbursements	3,343.48
FTI Consulting fees	450,000.00
FTI Consulting disbursements	5,936.36
Other Disbursements	114,514.35
Arbitration costs	374,205.93
<b>Total Incurred (EUR)</b>	<b>3,810,381.57</b>

262. Kosovo submits that it has incurred the following costs in connection with this arbitration:

Description	Total incurred (in USD)	Total incurred (in EUR)
Squire Patton Boggs fees	1,613,542.50	
Squire Patton Boggs expenses	46,596.18	
Squire Patton Boggs expenses in EUR		3,566.67
Professor Qerimi fees		15,000
Professor Qerimi expenses		1142.73
KPMG fees		100,000
KPMG expenses		740
Witness expenses		5,335.72
Party representative expenses		6,661.08
Arbitration costs	400,000	
<b>Totals Incurred</b>	<b>2,060,138.68 USD</b>	<b>132,446.2 Euro</b>

263. The actual costs of the arbitration, which include the fees and expenses of the Tribunal and ICSID's administrative fees and direct expenses, amount to (in USD):

Arbitrators' fees and expenses

Mr. Pinsolle	\$238,433.35
Dr. Feit	\$105,335.50
Mr. Thomas	\$70,737.47

ICSID's administrative fees \$106,000.00

Direct expenses \$113,000.12

**Total** **\$633,506.44**

264. The above costs have been paid out of the advances made by the Parties in equal parts. As a result, each Party's share of the costs of arbitration amounts to **USD 316,753.22**.<sup>210</sup>

265. Regarding the allocation of costs, Axos requests in its last pleading (i.e., the Rejoinder on Jurisdiction and Admissibility dated 29 September 2017) that the costs be allocated to Kosovo in full:

*d. order that the Respondent pay the cost of these arbitration proceedings, including the fees and expenses of the Tribunal, as well as legal and other expenses incurred by the Claimant, including the fees of its legal counsel, experts and consultants, plus interest thereon at a reasonable rate from the date on which such costs are incurred to the date of payment;*

266. Similarly, Kosovo requests, in its Counter-Memorial dated 23 December 2017 and Rejoinder on Merits and Quantum and Reply on Jurisdiction and Admissibility dated 1 September 2017, the full allocation of costs to Axos:

*(d) ordering Axos to pay the costs of this arbitration, including the costs of the Arbitral Tribunal and the legal and other costs incurred by Kosovo on a full indemnity basis, plus interest in an amount to be determined by the Tribunal.*

267. It follows that the prayers for relief of both Parties contain a request to order the other party to pay the arbitration costs. Put differently, both Parties agree to the application in the present case of the "cost follows the event" rule, pursuant to which the successful party should recover its reasonable costs. The Tribunal sees no reason to depart from this rule and will proceed accordingly.

268. In the present case, Kosovo has been successful in its defence. It is consequently entitled to reimbursement from Axos of its reasonably incurred costs, including the costs of arbitration and Kosovo's legal fees and expenses.

269. The Tribunal has examined Kosovo's claim for its legal fees. It notes that Kosovo has subjected a portion of its legal fees ("Squire Patton Boggs fees") to a "success fee arrangement", described as follows "*Squire Patton Boggs has been paid USD 500,000 of the above fees. Payment of the*

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<sup>210</sup> The remaining balance in the case account will be reimbursed to the Parties in proportion to the payments that they advanced to ICSID.

*remainder of its fees are contingent upon a success fee arrangement with the Republic of Kosovo which is capped at USD 850,000”.*<sup>211</sup>

270. Kosovo has thus incurred USD 500,000 in legal fees to date. However, it follows from this “success fee arrangement” that Kosovo, having been successful in its defence, will incur an additional USD 850,000 in legal fees (a cap which Kosovo will reach, considering the fees recorded by its counsel Squire Patton Boggs). Consequently, Kosovo will incur a total of USD 1,350,000 in legal fees.
271. The Tribunal further notes that the amount of USD 1,350,000 of legal fees is perfectly reasonable for defending the full case. The Claimant’s legal fees, which are perfectly reasonable too given that it is the Claimant’s duty to put forward the full case, amount to EUR 2.5 million which is twice as much. The amount of USD 1,350,000 should therefore be recoverable in full.
272. The remainder of the “Squire Patton Boggs” fees set forth in Kosovo’s Submissions on Costs, which will not be incurred by Kosovo, cannot be recovered under Article 61(2) of the ICSID Convention.
273. The Tribunal notes that Respondent has requested that it be granted interest on any costs awarded to it “in an amount to be determined by the Tribunal.” However, the Respondent has not provided any arguments or evidence in support of this request, nor has it explained the basis on which the Tribunal could make such an order under Article 61(2) of the ICSID Convention. In these circumstances, the Tribunal declines to grant Respondent’s claim for interest.
274. As a result, the Tribunal finds that Axos is to pay Kosovo in total the amounts of **USD 1,713,349.40** and **EUR 132,446.20**.

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<sup>211</sup> Respondent’s Statement of Costs.

## V. AWARD

275. For the reasons set forth above, the Tribunal decides as follows:

- (i) The Tribunal lacks jurisdiction over the present dispute;
- (ii) The Claimants shall bear the entirety of the costs of this arbitration, including the fees and expenses of the Tribunal, ICSID's administrative fees, and direct expenses, as well as the Respondent's reasonable legal fees and expenses incurred in connection with this arbitration. The Claimants shall thus pay to the Respondent **USD 1,713,349.40** and **EUR 132,446.20**.
- (iii) All other requests for relief are dismissed.

[SIGNED]

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J. Christopher Thomas QC  
Arbitrator

Date: 2 May 2018

[SIGNED]

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Dr. Michael Feit  
Arbitrator

Date: 1 May 2018

[SIGNED]

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Philippe Pinsolle  
President of the Tribunal

Date: 3 May 2018