



ICSID (INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES)

ICSID Case No. ARB/17/34

RAIFFEISEN BANK INTERNATIONAL AG AND RAIFFEISENBANK AUSTRIA D.D. V.  
REPUBLIC OF CROATIA

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DECISION ON THE RESPONDENT'S JURISDICTIONAL OBJECTIONS

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30 September 2020

Tribunal:

[Stanimir A. Alexandrov](#) (Appointed by the investor)

[Lucy F. Reed](#) (President)

[Lazar Tomov](#) (Appointed by the State)

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# Table of Contents

Decision on the Respondent's Jurisdictional Objections .....	1
TABLE OF SELECTED ABBREVIATIONS AND DEFINED TERMS .....	1
I. INTRODUCTION AND THE PARTIES .....	3
II. PROCEDURAL HISTORY .....	4
III. THE PARTIES' REQUESTS FOR RELIEF .....	14
IV. KEY TREATY PROVISIONS AND DATES .....	15
A. KEY TREATY PROVISIONS .....	15
B. TIMELINE OF KEY DATES .....	18
V. BURDEN OF PROOF ON JURISDICTION .....	19
A. THE PARTIES' POSITIONS .....	19
B. THE TRIBUNAL'S ANALYSIS AND DECISION .....	20
VI. INTERPRETATION OF ARTICLE 11(2) OF THE AUSTRIA-CROATIA BIT .....	20
A. THE PARTIES' POSITIONS .....	20
(1) Article 11(2) as a Conflict Clause .....	20
(2) Alternative Conflict Rules .....	21
a. Article 30 of the VCLT .....	21
b. Conflict Clauses in EU Treaties .....	22
(3) The Meaning of "incompatible" under Article 11(2) of the BIT .....	23
(4) The Import of "in force at any given time" .....	25
B. THE TRIBUNAL'S ANALYSIS AND DECISION .....	28
(1) Preliminary Observations .....	28
(2) Article 11(2) as a Conflict Clause .....	29
(3) The Meaning of "incompatible" under Article 11(2) of the BIT .....	29
(4) The Import of "in force at any given time" .....	30
VII. WHETHER ARTICLE 9 OF THE BIT IS INCOMPATIBLE WITH ARTICLES 276 AND 344 OF THE TFEU .....	33
A. THE PARTIES' POSITIONS .....	33
(1) The Achmea Judgment and its Effect .....	33
a. Whether the Achmea Judgment is Binding in this Proceeding .....	33
b. The Scope of Application of the Achmea Judgment .....	36
c. The Temporal Application of the Achmea Judgment .....	41
(2) Incompatibility with Articles 276 and 344 of the TFEU .....	44
(3) The 15 January 2019 Declaration and the 29 May 2020 Termination Treaty .....	46
a. The 15 January 2019 Declaration .....	46
b. The 29 May 2020 Termination Treaty .....	48
B. THE TRIBUNAL'S ANALYSIS AND DECISION BY MAJORITY .....	50
(1) The EU Acquis on 15 September 2017 and the Effect of the Achmea Judgment .....	51
(2) Incompatibility with Articles 276 and 344 of the TFEU .....	54
(3) Article 46 of the VCLT .....	56
(4) The 15 January 2019 Declaration and the 29 May 2020 Termination Treaty .....	57
C. THE DISSENTING VIEW .....	59
VIII. WHETHER THE BIT IS INCOMPATIBLE WITH THE ANTI-DISCRIMINATION PROVISIONS OF THE EU ACQUIS .....	59
A. THE PARTIES' POSITIONS .....	59

# Table of Contents

(1) Compatibility with the EU Treaties .....	60
(2) Compatibility with the GATS.....	63
B. THE TRIBUNAL'S ANALYSIS AND DECISION .....	64
(1) Compatibility with the EU Treaties .....	64
(2) Compatibility with the GATS.....	65
IX. THE MONETARY GOLD PRINCIPLE.....	66
A. THE PARTIES' POSITIONS .....	66
B. THE TRIBUNAL'S ANALYSIS AND DECISION .....	67
X. COSTS.....	67
A. THE PARTIES' POSITIONS .....	67
(1) The Respondent's Costs .....	67
(2) The Claimants' Costs.....	68
B. THE TRIBUNAL'S ANALYSIS AND DECISION .....	69
XI. DECISION .....	69

# Decision on the Respondent's Jurisdictional Objections

## TABLE OF SELECTED ABBREVIATIONS AND DEFINED TERMS

<i>Achmea</i> Arbitration	<a href="#">26 October 2010 Award on Jurisdiction, Arbitrability and Suspension in <i>Achmea (formerly Eureko) v. Slovak Republic</i>, PCA Case No. 2008-13</a>
<i>Achmea</i> Judgment	<a href="#">6 March 2018 Judgment of the Court of Justice of the European Union in <i>Slowakische Republik v. Achmea BV</i>, Case C-284/16 (RLM-31)</a>
<i>Achmea</i> Wathelet Opinion	<a href="#">19 September 2017 Opinion of Advocate General Wathelet in <i>Slowakische Republik v. Achmea BV</i>, Case C-284/16 (CLM-177)</a>
<i>Acquis</i>	European Union <i>acquis communautaire</i>
<i>Addiko</i> Decision	<a href="#">12 June 2020 Decision on Croatia's Jurisdictional Objection Related to the Alleged Incompatibility of the BIT with the EU <i>Acquis</i> in <i>Addiko Bank AG &amp; Addiko Bank d.d. v. Republic of Croatia</i>, ICSID Case No. ARB/17/37 (CLM-250)</a>
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings (2006)
Association Agreement	Stabilisation and Association Agreement between the European Communities and their Member States, on the one part, and the Republic of Croatia, on the other part, concluded in Luxembourg on 29 October 2001, which entered into force on 1 February 2005 (CLM-218)
Austria-Croatia BIT or BIT	<a href="#">Agreement between the Republic of Austria and the Republic of Croatia for the Promotion and Protection of Investments, which entered into force on 1 November 1999 (C-4)</a>
CETA	<a href="#">Comprehensive Economic and Trade Agreement (Canada and the European Union)</a>
CJEU	Court of Justice of the European Union
C-[#]	Claimants' Factual Exhibit
CLM-[#]	Claimants' Legal Authority
Claimants' Counter-Memorial	Claimants' Counter-Memorial on Jurisdiction dated 31 May 2019
Claimants' Rejoinder	Claimants' Rejoinder on Jurisdiction dated 11 October 2019
Conference	United Nations Conference on the Law of Treaties
Croatia	The Republic of Croatia
EC	European Commission

ECT	Energy Charter Treaty
EU	European Union
EU Treaties	Treaty on the European Union and Treaty on the Functioning of the European Union
15 January 2019 Declaration	Declaration of the Representatives of the Governments of the Member States on the Legal Consequences of the Judgment of the Court of Justice in <i>Achmea</i> and on Investment Protection in the European Union (RLM-60)
GATS	<a href="#">World Trade Organization General Agreement on Trade in Services</a> (RLM-33)
Hearing	Hearing on Preliminary Objections held from 4-6 November 2019
ICJ	International Court of Justice
ICSID Convention	<a href="#">Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, which entered into force on 14 October 1966</a>
ICSID	International Centre for Settlement of Investment Disputes
ILC	United Nations International Law Commission
Preliminary Objections	Croatia's Preliminary Objections to Jurisdiction and Request to Suspend the Proceedings on the Merits dated 30 November 2018
R-[#]	Respondent's Factual Exhibit
RBI	Raiffeisen Bank International AG
RBHR	Raiffeisenbank Austria d.d.
Respondent's Memorial	Respondent's Memorial on Jurisdiction dated 14 February 2019
Respondent's Reply	Respondent's Reply on Jurisdiction dated 9 August 2019
RLM-[#]	Respondent's Legal Authority
Termination Treaty	Agreement for the Termination of Bilateral Investment Treaties between Member States of the European Union dated 29 May 2020 (RLM-173)
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
Tr. Day X, [page:line (speaker)]	Transcript of the Hearing
Tribunal	Arbitral tribunal constituted on 15 February 2018
<i>UniCredit</i> Decision	<a href="#">12 October 2018 Decision on the Respondent's Article 9 Objection to Jurisdiction in <i>UniCredit Bank Austria AG and Zagrebačka Banka d.d. v. Republic of Croatia</i>, ICSID Case No. ARB/16/31 (CLM-210)</a>
<i>UniCredit</i> Reconsideration Decision	<a href="#">24 March 2020 Decision on the Respondent's Application for Reversal of the Article 9 Decision and Decision on Jurisdiction and Admissibility in <i>UniCredit Bank Austria AG and Zagrebačka Banka d.d. v. Republic of Croatia</i>, ICSID Case No. ARB/16/31 (CLM-251)</a>

VCLT	<a href="#">Vienna Convention on the Law of Treaties</a> (CLM-129)
WTO	World Trade Organization

## I. INTRODUCTION AND THE PARTIES

1. This arbitration involves a dispute submitted to the International Centre for Settlement of Investment Disputes (*ICSID*) on the basis of the [Agreement between the Republic of Austria and the Republic of Croatia for the Promotion and Protection of Investments, which entered into force on 1 November 1999](#) (the *Austria-Croatia BIT* or the *BIT*) and [the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966](#) (the *ICSID Convention*).
2. The Claimants are Raiffeisen Bank International AG (*RBI*), a company organized under the laws of the Republic of Austria (*Austria*), and Raiffeisenbank Austria d.d. (*RBHR*), a company organized under the laws of the Republic of Croatia and 100 percent indirectly owned by RBI (together, *Raiffeisen*).<sup>1</sup>
3. The Respondent is the Republic of Croatia (*Croatia*).
4. According to Raiffeisen, RBI became the first foreign bank to operate in Croatia when it established RBHR in 1994, leading to investments of approximately EUR 400 million in Croatia.<sup>2</sup> This dispute concerns RBHR's issuance of loans denominated in Swiss Francs to Croatian consumers and businesses starting in 2004, and legislation enacted in Croatia in September 2015 converting the denomination of those loans into Euros. The Claimants allege that, with this conversion, Croatia breached the fair and equitable treatment obligations owed under the [Austria-Croatia BIT](#), causing damages of approximately EUR 64.5 million (before interest).<sup>3</sup>
5. The merits of Raiffeisen's claims are not now before the Tribunal.
6. The Tribunal has bifurcated the Respondent's preliminary objections for separate consideration (the *Preliminary Objections*). The main issue in this Preliminary Objection phase is whether, as Croatia contends, the Tribunal lacks jurisdiction of this dispute under the ICSID [arbitration clause in Article 9 of the Austria-Croatia BIT](#) by operation of [Article 11\(2\) of the BIT](#) because Article 9 and substantive protections of the BIT are incompatible with the European Union *acquis communautaire* (the *EU* and the *acquis*). [Article 11\(2\) of the Austria-Croatia BIT](#) provides in full:

*The Contracting Parties are not bound by the present Agreement insofar as it is incompatible with*

<sup>1</sup> Request for Arbitration, para 13.

<sup>2</sup> Request for Arbitration, para 2.

<sup>3</sup> Claimants' Memorial, Sections V and VI.

*the legal acquis of the European Union (EU) in force at any given time.*<sup>4</sup>

7. Much of the Parties' focus, and hence the Tribunal's focus, is on the direct and indirect import of the 6 March 2018 Judgment of the Court of Justice of the European Union (the *CJEU*) in the highly-publicized intra-EU BIT case of *Slowakische Republik v. Achmea B.V.* (the *Achmea Judgment*) on the proper application of [Article 11\(2\) of the Austria-Croatia BIT](#).<sup>5</sup>
8. For the reasons set forth below, the Tribunal, by a majority, dismisses Croatia's Preliminary Objections and determines that it has jurisdiction to proceed to consider the merits of Raiffeisen's claims.

## II. PROCEDURAL HISTORY

9. On 1 September 2017, ICSID received a Request for Arbitration of the same date from RBI and RBHR against Croatia, together with Exhibits C-1 to C-76 and Legal Authorities CLM-1 to CLM-27.
10. On 15 September 2017, the Secretary-General of ICSID registered the Request for Arbitration in accordance with [Article 36\(3\) of the ICSID Convention](#) and notified the Parties of the registration. Rule 6(2) of the ICSID Institution Rules provides that an ICSID arbitration "shall be deemed to have been instituted on the registration of the request." 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 Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.
11. In the absence of an agreement between the Parties on the method of constituting the Tribunal, the Tribunal was constituted in accordance with the formula set forth in [Article 37\(2\)\(b\) of the ICSID Convention](#).
12. The Tribunal is composed of Ms. Lucy Reed, a national of the United States of America and (as of appointment) a Professor on the Law Faculty of the National University of Singapore, President, appointed by agreement of the Parties; Professor Stanimir Alexandrov, a national of the Republic of Bulgaria, appointed by the Claimants; and Mr. Lazar Tomov, a national of the Republic of Bulgaria, appointed by the Respondent.
13. On 15 February 2018, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the *ICSID Arbitration Rules*), notified the Parties that all three arbitrators had accepted their appointments and, therefore, the Tribunal was deemed to have been constituted on that date. Mr. Alex B. Kaplan, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

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<sup>4</sup> Agreement between the Republic of Austria and the Republic of Croatia for the Promotion and Protection of Investments, which entered into force on 1 November 1999 (the BIT) (C-4).

<sup>5</sup> *Slowakische Republik v. Achmea B.V.*, Case C-284/16, Judgment of the Court, 6 March 2018 (the *Achmea Judgment*) (RLM-31).

14. On 28 February 2018, pursuant to [Article 57 of the ICSID Convention](#) and ICSID Arbitration Rule 9, Croatia filed a proposal for disqualification of Professor Alexandrov (the *Disqualification Proposal*), together with Exhibits R-1 to R-12 and Legal Authorities RLM-1 to RLM-17. The proceeding was suspended in accordance with ICSID Arbitration Rule 9(6).
15. By ICSID letter of 2 March 2018, the Tribunal set out a procedural calendar and invited the Parties and Professor Alexandrov to make submissions concerning the Disqualification Proposal.
16. On 8 March 2018, in response to the Tribunal's invitation, RBI and RBHR filed their Response to the Disqualification Proposal, together with Exhibits C-77 to C-83 and Legal Authorities CLM-28 to CLM-36.
17. By letter of 12 March 2019, ICSID informed the Parties that Professor Alexandrov would not be submitting observations on the Parties' submissions related to the Disqualification Proposal, and Ms. Reed and Mr. Tomov invited the Parties to file any further observations in connection with the Disqualification Proposal simultaneously by 20 March 2018.
18. On 20 March 2018, Croatia filed its Further Observations on the Disqualification Proposal, together with Exhibit R-13 and Legal Authorities RLM-18 and RLM-19. On the same date, RBI and RBHR informed the Tribunal that they would not submit further observations.
19. On 6 April 2018, ICSID transmitted to the Parties Mr. Tomov's letter recusing himself from participating in the decision on the Disqualification Proposal and explained that, in the circumstances, the Chairman of the ICSID Administrative Council would make the decision.
20. On 17 May 2018, the Chairman of the Administrative Council issued his decision rejecting the Disqualification Proposal. The proceeding was then resumed pursuant to ICSID Arbitration Rule 9(6).
21. On 14 June 2018, Mr. Tomov updated his disclosure statement to reflect that, among other things, he was serving as co-counsel for the Republic of Bulgaria in a number of investment arbitrations in which Bulgaria had raised or intended to raise jurisdictional objections on the basis of the *Achmea* Judgment. Mr. Tomov explained that his responsibilities as co-counsel in those cases did not relate to *Achmea* issues, and he believed that this role did not affect his independence and impartiality as an arbitrator in this case.
22. The Respondent did not raise any concerns with Mr. Tomov's updated disclosure. By letter dated 22 June 2018, the Claimants stated that they would not object to Mr. Tomov's continuing to serve as arbitrator. Anticipating that Croatia would raise jurisdictional defenses based on the *Achmea* Judgment, the Claimants stated:

*... the Claimants take particular note of Mr. Tomov's assurances that his responsibility as co-counsel [for Bulgaria] does not affect his independence and impartiality. The Claimants also take note of his assurances that he has no involvement in Bulgaria's decision to make this objection or in the preparation of Bulgaria's written and oral pleadings related to it. The Claimants assume that should any of these circumstances change,*

*Mr. Tomov will promptly inform the parties.*

23. In accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the Parties by teleconference on 25 June 2018.
24. Following the first session, on 19 July 2018, the Tribunal issued Procedural Order No. 1 recording the agreement of the Parties on various procedural matters. Procedural Order No. 1 provides that, among other things, the applicable ICSID Arbitration Rules are those in effect from 10 April 2006, the procedural language is English, and the place of proceeding is Washington, D.C. Procedural Order No. 1 also sets out a schedule for the Preliminary Objections phase of the proceeding.
25. On 14 September 2018, in accordance with Procedural Order No. 1, RBI and RBHR filed their Memorial on the Merits, together with the Damages Assessment Report of Dr. Manuel A. Abdala of Compass Lexicon (with Exhibits MA-1 to MA-52), Exhibits C-84 to C-236, and Legal Authorities CLM-37 to CLM 128.
26. On 22 November 2018, the European Commission (the *EC*) filed an Application for Leave to Intervene as a Non-Disputing Party (the *EC's Application*) pursuant to ICSID Arbitration Rule 37(2).
27. On 30 November 2018, Croatia filed its Preliminary Objections to Jurisdiction and Request to Suspend the Proceedings on the Merits, together with Exhibits R-14 to R-18 and Legal Authorities RLM-20 to RLM-53.
28. By ICSID letter of 3 December 2018, the Tribunal invited the Parties to file any observations on the EC's Application by 14 December 2018.
29. On 14 December 2018, RBI and RBHR filed their Response to Croatia's Preliminary Objections (the *Claimants' Response*), together with Exhibits C-237 to C-239 and Legal Authorities CLM-129 to CLM-161. In their Response, the Claimants referred to a [12 October 2018 Decision on Jurisdiction in UniCredit Bank Austria AG and Zagrebačka Banka d.d. v. Republic of Croatia \(ICSID Case No. ARB/16/31\)](#) (the *UniCredit Decision*), involving the [Austria-Croatia BIT](#).
30. Also on 14 December 2018, the Parties filed their observations on the EC's Application. Raiffeisen's observations included Exhibits C-240 and C-241 and Legal Authorities CLM-162 to CLM-165. Croatia's observations included Legal Authorities RLM-54 to RLM-59.
31. On 18 December 2018, the Tribunal invited Croatia to provide a copy of the *UniCredit Decision* for the record.
32. On the same date, 18 December 2018, Croatia informed the Tribunal that the Claimants apparently had obtained a copy of the *UniCredit Decision* "in violation of the procedures of that case" and that Croatia could not "properly produce the *UniCredit Decision* in this present proceeding." Croatia requested that any references to the *UniCredit Decision* be struck from Raiffeisen's Response or, in

the alternative, that the Tribunal give no weight to Raiffeisen's description of the *UniCredit* Decision in its ruling.

33. By email dated 19 December 2018, the Claimants objected to Croatia's refusal to provide a copy of the *UniCredit* Decision on grounds, among others, that Croatia had failed to identify the specific procedures in the *UniCredit* arbitration that would bar sharing the *UniCredit* Decision with the Tribunal or to assert that Croatia was under a confidentiality order preventing the same. Raiffeisen requested the Tribunal to draw adverse inferences as a result of Croatia's failure to produce the *UniCredit* Decision.
34. On 21 December 2018, the Tribunal issued Procedural Order No. 2 concerning Croatia's Preliminary Objections. The Tribunal ordered as follows in paragraph 73 of Procedural Order No. 2:
  - a) the Respondent's Preliminary Objections—that (i) the BIT is not incompatible with the EU *acquis* and (ii) the Claimants do not qualify as "investors" and hold qualifying "investments" under the BIT—were bifurcated for preliminary resolution;
  - b) the Claimants' request to proceed with the bifurcated preliminary issues without suspension of the proceedings on the merits was denied;
  - c) the Parties were ordered to consult to attempt to agree on the length of the hearing on the Preliminary Objections and to identify possible hearing dates, with the Claimants' request for an accelerated timetable deemed denied;
  - d) the Claimants' request that the Respondent be ordered to raise all preliminary objections, whether going to jurisdiction, competence, or admissibility, for inclusion in the bifurcated Preliminary Objections phase was granted;
  - e) by 7 January 2019, the Respondent was either to provide to the Tribunal and the Claimants a copy of the *UniCredit* Decision on a confidential basis or to provide information as to the specific procedures preventing this step;
  - f) the Respondent's requests either to strike all references to the *UniCredit* Decision from the Claimants' Response or to give no weight to those references were denied as premature, with leave to reapply; and
  - g) the Claimants' request for adverse inferences in relation to the import of the *UniCredit* Decision was denied as premature, with leave to reapply.
35. On 31 December 2018, the Parties informed the Tribunal that Croatia had agreed to provide the Claimants and the Tribunal with a copy of the *UniCredit* Decision on a confidential basis, and that the Parties had also agreed that the *UniCredit* Decision and Procedural Order No. 2 could be shared on a confidential basis with tribunals in other arbitration proceedings involving Croatia.
36. On the same date, 31 December 2018, the Tribunal issued Procedural Order No. 3 granting the EC's Application in part. In specific:

- a) the EC was invited to file a written submission limited to the legal consequences for this arbitration of the *Achmea* Judgment by 14 January 2019;
  - b) the Parties were invited to include observations on the EC's submission in their respective memorials on jurisdiction;
  - c) absent the Parties' agreement, the EC would not have access to the record or any documents pertaining to this arbitration;
  - d) the Tribunal reserved its decision on further procedural steps, if any;
  - e) the Tribunal reserved any decision on the allocation of costs and fees related to the EC's submissions; and
  - f) Procedural Order No. 3 was to be communicated to the EC, which should not communicate it to third parties or make use of it outside this arbitration.
37. On 7 January 2019, pursuant to paragraph 73(e) of Procedural Order No. 2, and after having received from the *UniCredit* tribunal the decision on the confidentiality of the *UniCredit* Decision, Croatia provided the *UniCredit* "Decision on the Respondent's Article 9 Objection to Jurisdiction" dated 12 October 2018 to the Tribunal and the Claimants.
38. On 11 January 2019, Croatia requested an exception to the order in paragraph 73(d) of Procedural Order No. 2, specifically with regard to its intended objection based on the alleged illegality under Croatian law of certain of Raiffeisen's investments (the *Illegality Objection*).
39. On 14 January 2019, the EC filed an *Amicus Curiae* Brief in this arbitration, including Annexes EC-1 to EC-30.
40. On 15 January 2019, RBI and RBHR filed observations on Croatia's request of 11 January 2019 concerning the *Illegality Objection*, asking the Tribunal either to join all of Croatia's jurisdictional objections to the merits or to maintain its order in paragraph 73(d) of Procedural Order No. 2 and include the *Illegality Objection* in the Preliminary Objections phase.
41. By correspondence from ICSID on 28 January 2019, the Tribunal invited the EC to resubmit its *Amicus Curiae* Brief, which contained erroneous references to the [Poland-Slovak Republic BIT](#), with corrected references to this arbitration and to include a redline reflecting the corrections.
42. Also on 28 January 2019, the Tribunal invited Croatia to submit by 1 February 2019 further observations on Raiffeisen's observations of 15 January 2019 concerning the *Illegality Objection*.
43. On 1 February 2019, Croatia filed a response to the Claimants' observations of 15 January 2019, together with Legal Authorities RLM-60 to RLM-62.
44. On 7 February 2019, in Procedural Order No. 4, the Tribunal issued its decision on the scope of the Preliminary Objections addressed in Croatia's request of 11 January 2019, ordering as follows:

- a) the Respondent would be allowed to raise its Illegality Objection in the merits phase, should the arbitration proceed past the bifurcated preliminary phase;
- b) the Claimants' request that the Tribunal join the Illegality Objection to the merits phase or, in the alternative, include the Illegality Objection in the Preliminary Objections phase was denied;
- c) the issue of costs was reserved; and
- d) pursuant to paragraph 73(c) of Procedural Order No. 2, the Parties were to return to their consultations to attempt to agree on the length of the hearing for the Preliminary Objections, and to revert to the Tribunal on the same by 15 February 2019.
45. On 14 February 2019, Croatia filed its Memorial on Jurisdiction (the *Respondent's Memorial*), together with the Legal Opinion of Professor Paul Craig (Hon QC) (with Legal Authorities PC-1 to PC-60) (the *Craig Opinion*), Exhibits R-19 to R-25, and Legal Authorities RLM-63 to RLM-109.
46. On 15 February 2019, the Parties informed the Tribunal that the Parties had agreed on a three-day hearing for the Preliminary Objections from 4–6 November 2019, but they had been unable to agree on an accelerated timetable. By ICSID's correspondence of 27 February 2019, the Tribunal confirmed that it had reserved the 4–6 November 2019 hearing dates.
47. On 6 March 2019, the EC submitted a revised version of its *Amicus Curiae* Brief, correcting ministerial errors.
48. On 29 March 2019, pursuant to the procedural timetable at Annex B of Procedural Order No. 1, each side requested the Tribunal to rule on contested document requests and submitted a Redfern Schedule for this purpose.
49. On 5 April 2019, the Tribunal issued Procedural Order No. 5 setting out its decisions on the contested document requests in the Parties' respective Redfern Schedules. The Tribunal further ordered that "[i]f a Party wishes to claim privilege for certain documents whose production is ordered, it must prepare a Privilege Log setting out the necessary details for each document," to be submitted by 26 April 2019.
50. On 1 May 2019, pursuant to Procedural Order No. 5, Croatia submitted a Privilege Log listing 48 documents for which it claimed privilege from production, accompanied by Legal Authorities RLM-110 to RLM-112.
51. There followed an extensive exchange of positions on Croatia's assertions of privilege, with leave of the Tribunal. Raiffeisen submitted comments, including Legal Authority CLM-166, on 8 May 2019; Croatia replied on 14 May 2019, submitting Legal Authority RLM-113; and Raiffeisen submitted additional comments on 17 May 2019.
52. On 20 May 2018, in Procedural Order No. 6, the Tribunal denied each of the Respondent's privilege claims and ordered Croatia to produce the 48 documents listed in its Privilege Log by 24 May 2019. The Tribunal also granted the Claimants an extension of time until 31 May 2019 to file their

counter-memorial on preliminary objections.

53. On 24 May 2019, the Respondent's counsel informed the Tribunal that Croatia could not comply with Procedural Order No. 6 to produce the 48 documents listed in the Privilege Log pending receipt of express written permission from the EC to do so.
54. On 28 May 2019, the Tribunal directed the Respondent's counsel to provide copies by 30 May 2019 of: (a) the authorities on which they relied in support of the asserted requirement for express written permission from the EC to produce each of the 48 documents at issue, and; (b) the letters they had sent to the EC seeking such permission.
55. On 31 May 2019, RBI and RBHR filed their Counter-Memorial on Jurisdiction (the *Claimants' Counter-Memorial*), together with the Legal Opinion of Sir Francis Jacobs KCMG, QC (with Legal authorities FJ-1 to FJ-42) (the *Jacobs Opinion*), the Witness Statement of Mr. Robert Kaukal (with Exhibits RK-1 to RK-6), Exhibits C-242 to C-252, and Legal Authorities CLM-167 to CLM-217.
56. By letter dated 30 May 2019, the Respondent provided copies of unanswered emails sent to the EC concerning the 48 withheld documents and stated as follows (footnotes omitted):

*In accordance with the Tribunal's direction of 28 May 2019, the Respondent confirms that the authorities on which it relies in support of the requirement for express written permission from the European Commission to produce the 48 documents listed in the Respondent's Privilege Log filed on 1 May 2019 are those set out in the Privilege Log and in subsequent correspondence. That is, each of the 48 documents listed in the Respondent's Privilege Log qualify as diplomatic archives, documents or official correspondence which are inviolable under [Articles 24 and 27 of the 1961 Vienna Convention on Diplomatic Relations](#) (to which both the Republic of Croatia and the Republic of Austria are parties), as well as under customary international law. The inviolability of diplomatic archives, documents and official correspondence is a cornerstone of the efficient performance of the functions of diplomatic missions, as set out in the Preamble to the Vienna Convention on Diplomatic Relations and as confirmed by the widespread practice of both States and the European Union itself.*

57. On 4 June 2019, on invitation by the Tribunal, Raiffeisen submitted comments on Croatia's submission of 30 May 2019 concerning the allegedly privileged 48 documents. In addition to describing Croatia's unanswered emails to the EC as containing no support for the assertion that EC permission was necessary for production, the Claimants stated:

*[T]he Respondent offers no legal basis whatsoever for its entirely new claim (not raised previously with its Privilege Log or in its letter of 14 May 2019) that the European Commission's consent is required to allow the Respondent to produce the 48 documents listed in its Privilege Log, as directed by the Tribunal in Procedural Order No. 6. In fact, instead of addressing the alleged consent requirement, the Respondent merely repeats the baseless arguments invoking the Vienna Convention on Diplomatic Relations, customary international law and Protocol No. 7 to the Treaty on the Functioning of the European Union that it had previously presented and that the Tribunal had already rejected as a purported legal basis for privilege in Procedural Order No. 6.*

58. By ICSID letter of 9 June 2019, the Tribunal stated that it could not find in the Respondent's 30 May 2019 submission any support for its claim of privilege against production based on the alleged requirement of express written permission from the EC. Under these circumstances, the Tribunal re-confirmed Procedural Order No. 6 and directed Croatia to produce the 48 documents listed in the Privilege Log by 21 June 2019. The Tribunal also invited the Parties' counsel to consult on a special purpose confidentiality undertaking, if that should be agreed to be helpful.
59. On 21 June 2019, Croatia again informed the Tribunal that it could not, without permission of the EC, produce the 48 documents. Croatia also reported that it was continuing efforts to obtain the EC's permission and would update the Tribunal on any further developments. On 28 June 2019, Raiffeisen again objected to Croatia's position.
60. On 9 August 2019, Croatia filed its Reply on Jurisdiction (the *Respondent's Reply*), together with the Second Legal Opinion of Professor Craig (with Legal Authorities PC-61 to PC-65) (the *Second Craig Opinion*), Exhibits R-26 to R-28, and Legal Authorities RLM-114 to RLM-126.
61. The Tribunal here notes that, based on the Witness Statement of Mr. Robert Kaukal and Raiffeisen corporate documents exhibited with the Claimants' Counter-Memorial, the Respondent in its Reply stated that it would not maintain its Preliminary Objections that RBI and RBHR do not qualify as "investors" and did not make qualifying "investments" under the [Austria-Croatia BIT](#).<sup>6</sup>
62. On 11 October 2019, RBI and RBHR filed their Rejoinder on Jurisdiction (the *Claimants' Rejoinder*), together with the Second Legal Opinion of Sir Francis (with Legal Authority FJ-43) (the *Second Jacobs Opinion*), Exhibits C-253 to C-254, and Legal Authorities CLM-218 to CLM-241.
63. On 21 October 2019, the President of the Tribunal held a pre-hearing organizational meeting with the Parties by telephone conference.
64. On 24 October 2019, the Tribunal issued Procedural Order No. 7 concerning organization of the hearing.
65. On 31 October 2019, Croatia filed Exhibits R-29 and R-30 and, on 4 November 2019, Legal Authorities RLM-127 to RLM-137.
66. The Hearing on Preliminary Objections was held in Washington, D.C. from 4–6 November 2019 (the *Hearing*). The following persons were present at the Hearing:

*Tribunal :*

Professor Lucy Reed President  
Professor Stanimir Alexandrov Arbitrator  
Mr. Lazar Tomov Arbitrator

*ICSID Secretariat :*

Mr. Alex Kaplan Secretary of the Tribunal

*For the Claimants :*

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<sup>6</sup> Respondent's Reply on Jurisdiction (the Respondent's Reply), para 4.

*Counsel*

Mr. Gary Born Wilmer Cutler Pickering Hale and Dorr LLP  
Mr. Franz Schwarz Wilmer Cutler Pickering Hale and Dorr LLP  
Mr. Naboth van den Broek Wilmer Cutler Pickering Hale and Dorr LLP  
Ms. Danielle Morris Wilmer Cutler Pickering Hale and Dorr LLP  
Mr. Daniel Costelloe Wilmer Cutler Pickering Hale and Dorr LLP  
Mr. Nikolaus Vavrovsky Vavrovsky Heine Marth Rechtsanwälte  
Mr. Florian Stefan Vavrovsky Heine Marth Rechtsanwälte

*Parties*

Mr. Christian Michal Raiffeisen Bank International AG  
Mr. Werner Mörth Raiffeisen Bank International AG

*For the Respondent :*

*Counsel*

Mr. Robert G. Volterra Volterra Fietta  
Mr. Graham Coop Volterra Fietta  
Ms. Angela Ha Volterra Fietta  
Mr. Govert Coppens Volterra Fietta  
Ms. Patricija Biškupić Volterra Fietta

*Court Reporter :*

Ms. Dawn K. Larson B&B Reporters

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

*On behalf of the Claimants :*

*Experts*

Sir Francis Jacobs KCMG, QC Fountain Court Chambers/King's College London  
Mr. Alexander Milner Fountain Court Chambers

*On behalf of the Respondent :*

*Expert* Professor Paul Craig (Hon QC) University of Oxford, Faculty of Law

68. On 15 November 2019, the Parties submitted the agreed versions of the hearing transcript.
69. On 20 December 2019, Croatia filed its Post-Hearing Brief on Jurisdiction, together with Legal Authorities RLM-138 to RLM-165 (the *Respondent's Post-Hearing Brief*).
70. On 7 January 2020, the Tribunal Secretary transmitted to the Parties Ms. Reed's updated Disclosure Statement of 6 January 2020, set out below. The Parties made no comments.

*I write to inform you that my appointments as Professor on the Law Faculty and Director of the Centre for International Law at the National University of Singapore ended on 31 December 2019.*

*Going forward, I will work only as an independent arbitrator.*

*Effective today (6 January 2020) I have become a member of Arbitration Chambers, which has now opened an office in New York (in addition to Hong Kong and London). All members of Arbitration Chambers are independent arbitrators who operate entirely separately from one another. Members have no financial interest in the chambers, and Arbitration Chambers takes the necessary steps to maintain confidentiality and data security.*

*I bring this to your attention for the sake of good order. My new affiliation has no effect on my ongoing independence and impartiality.*

71. On 6 February 2020, RBI and RBHR filed their Post-Hearing Brief, together with Legal Authorities CLM-242 to CLM-249 (the **Claimants' Post-Hearing Brief**).
72. On 6 March 2020, the Claimants' submitted their Submissions on Costs and the Respondent submitted its Statement on Costs.
73. On 8 June 2020, the Tribunal Secretary transmitted to the Parties Ms. Reed's Further Disclosure of 6 June 2020, set out below. The Parties made no comments.

*I write to disclose that, following the passing of VV Veeder QC, I have been appointed as Presiding Arbitrator in the Ad Hoc arbitration of [Strabag SE, Raiffeisen Centrobank AG and Syrena Immobilien Holding AG v Republic of Poland \(Ad Hoc/15/1\)](#) (Strabag v Poland), administered by ICSID. The co-arbitrators who appointed me are Professor Albert Jan van den Berg and Professor Stephan Schill, who replaced Professor Dr Karl-Heinz Boecksteigel.*

*I do not consider that this appointment raises any actual or apparent conflict with the instant case of Raiffeisen v Croatia. Although the Strabag v Poland arbitration is not public, I am able to disclose that the relevant treaty is the [Austria-Poland BIT](#) and the Tribunal issued its [Partial Award on jurisdictional objections in early March 2020](#). There is no overlap between the arbitrators or the counsel in Strabag v Poland and the instant case.*

74. On 11 June 2020, Raiffeisen requested that the [24 March 2020 Decision on the Respondent's Application for Reversal of the Article 9 Decision and Decision on Jurisdiction and Admissibility in UniCredit Bank Austria AG and Zagrebačka Banka d.d. v. Republic of Croatia \(ICSID Case No. ARB/16/31\)](#) (the **UniCredit Reconsideration Decision**) be admitted into the record. The Claimants explained that Croatia had disclosed the UniCredit Reconsideration Decision on the basis that it could be used in the present arbitration and had confirmed that redactions had been made in accordance with the confidentiality restrictions to which Croatia is subject in the UniCredit arbitration.
75. On 17 June 2020, with Croatia's consent, Raiffeisen requested that the 12 June 2020 Decision on Croatia's Jurisdictional Objection Related to the Alleged Incompatibility of the BIT with the EU Acquis in *Addiko Bank AG & Addiko Bank d.d. v. Republic of Croatia* (ICSID Case No. ARB/17/37) (the **Addiko Decision**) be entered into the record.<sup>7</sup> On 18 June 2020, with the Tribunal's approval, the

*Addiko* Decision was admitted into the record as Legal Authority CLM-250.

76. On 24 June 2020, with the Tribunal's approval, the redacted *UniCredit* Reconsideration Decision was entered into the record as Legal Authority CLM-251.
77. Also on 24 June 2020, the Tribunal invited the Parties to simultaneously submit 10-page observations on the *UniCredit* Reconsideration Decision and the *Addiko* Decision, as well as updates to their costs submissions.
78. On 29 June 2020, Croatia requested leave to introduce into the record the 29 May 2020 Agreement for the Termination of Bilateral Investment Treaties between Member States of the European Union (the *Termination Treaty*) and to comment briefly thereon. The Tribunal invited Raiffeisen to submit any observations on Croatia's request by 6 July 2020.
79. On 6 July 2020, Croatia filed its Observations on the Rulings in *Addiko Bank AG & Addiko Bank d.d. v. Republic of Croatia*, ICSID Case No. ARB/17/37 and *UniCredit Bank Austria AG and Zagrebačka Banka d.d. v. Republic of Croatia*, ICSID Case No. ARB/16/31 (the *Respondent's Observations on Addiko and UniCredit*), together with Legal Authorities CLM-166 to CLM-172, and its Updated Statement of Costs (the *Respondent's Statement of Costs*).
80. Also on 6 July 2020, RBI and RBHR filed: (a) their Submission on New Authorities (the *Claimants' Observations on Addiko and UniCredit*), together with their Supplemental Submission on Costs (the *Claimants' Submission on Costs*); and (b) their opposition to admitting the Termination Treaty into the record.
81. On 8 July 2020, the Tribunal admitted the Termination Treaty into the record "for appropriate consideration," and invited the Parties to submit 10-page observations on the Termination Treaty by 15 July 2020.
82. On 9 July 2020, the Termination Treaty was entered into the record as Legal Authority RLM-173.
83. On 15 July 2020, the Respondent filed its Observations on the Agreement for the Termination of Bilateral Investment Treaties Between the Member States of the European Union (the *Respondent's Observations on the Termination Treaty*), and the Claimants filed their Submission on the Agreement for the Termination of Bilateral Investment Treaties Between the Member States of the European Union (the *Claimants' Observations on the Termination Treaty*).

### III. THE PARTIES' REQUESTS FOR RELIEF

84. In its last submission, the Respondent's Observations on the Termination Treaty, Croatia requests that the Tribunal issue an Award:
  - a. *declaring that it lacks jurisdiction over the Claimants' claims;*

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<sup>7</sup> *Addiko Bank AG & Addiko Bank d.d. v. Republic of Croatia* (ICSID Case No. ARB/17/37) (the *Addiko* Decision).

*b. ordering the Claimants to pay all of the Respondent's costs and fees incurred in this arbitration, including the Tribunal's and ICSID's fees and expenses, and all reasonable legal fees and expenses incurred by the Respondent (including, but not limited to, the fees and expenses of legal counsel and experts); and*

*c. ordering any other relief the Tribunal determines to be appropriate.<sup>8</sup>*

85. In their last submission, the Claimants' Observations on the Termination Treaty, RBI and RBHR request the Tribunal to issue a decision:

*a. dismissing all of Croatia's preliminary objections;*

*b. directing Croatia to pay all of RBI's and RBHR's costs associated with responding to Croatia's preliminary objections, including attorneys' fees;*

*c. directing the European Commission to pay all of RBI's and RBHR's costs associated with responding to the European Commission's Amicus Curiae Brief, including attorneys' fees;*

*d. directing Croatia and the European Commission to pay pre-award and post-award interest on all sums due; and*

*e. granting such additional and other relief as may be just.<sup>9</sup>*

## IV. KEY TREATY PROVISIONS AND DATES

86. The Tribunal sets out below certain key treaty provisions and a timeline of key dates, to assist in organizing and understanding the Parties' positions in this Preliminary Objections phase.

### A. KEY TREATY PROVISIONS

87.

[The Austria-Croatia BIT](#):<sup>10</sup>

[Article 2: Promotion and Protection of Investments](#)

*(1) Each Contracting Party shall in its territory, promote, as far as possible, investments of investors of the other Contracting Party, admit such investments in accordance with its legislation and in any case accord such investments fair and equitable treatment. ...*

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<sup>8</sup> Respondent's Observations on the Agreement for the Termination of Bilateral Investment Treaties Between the Member States of the European Union (the Respondent's Observations on the Termination Treaty), para 22.

<sup>9</sup> Claimants' Submission on the Agreement for the Termination of Bilateral Investment Treaties Between the Member States of the European Union (the Claimants' Observations on the Termination Treaty), para 18.

<sup>10</sup> BIT (C-4).

#### [Article 9: Settlement of Investment Disputes](#)

*(1) Any dispute arising out of an investment, between a 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 dispute according to paragraph 1 of this Article cannot be settled within three months of a written notification of sufficiently detailed claims, the dispute shall upon the request of the Contracting Party or of the investor of the other Contracting Party be subject to the following procedures:*

*(a) to conciliation or arbitration by the International Centre for Settlement of Investment Disputes established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature in Washington on 18 March 1965. In case of arbitration, each Contracting Party, by this Agreement irrevocably consents in advance, even in the absence of an individual arbitral agreement between the Contracting Party and the investor, to submit any such dispute to this Centre. This consent implies the renunciation of the requirement that the internal administrative or juridical remedies should be exhausted ...*

#### [Article 11: Application of the Agreement](#)

...

*(2) The Contracting Parties are not bound by the present Agreement insofar as it is incompatible with the legal acquis of the European Union (EU) in force at any given time.*

*(3) In case of uncertainties concerning the effects of paragraph 2 of this Article the Contracting Parties will enter a dialogue.*

#### [Article 12: Entry into Force and Duration](#)

...

*(3) In respect of investments made prior to the date of termination of the present Agreement the provisions of Article 1 to 11 of the present Agreement shall continue to be effective for a further period of 10 years from the date of termination of the present Agreement.*

88.

The ICSID Convention:

#### [Article 25\(1\)](#)

*The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State ... and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.*

89.

The Vienna Convention on the Law of Treaties (the *VCLT*):<sup>11</sup>

[Article 31: General Rule of Interpretation](#)

*1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*

*2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:*

*(a) Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty ...*

*3. There shall be taken into account, together with the context:*

*(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions ...*

90. The Treaty on the Functioning of the European Union (the *TFEU*):<sup>12</sup>

Article 18

*Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.*

*The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination.*

Article 49

*Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.*

*Freedom of establishment shall include the right to take up and pursue activities of self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.*

Article 63

*1. Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.*

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<sup>11</sup> Vienna Convention on the Law of Treaties (the VCLT) (CLM-129).

<sup>12</sup> Treaty on the Functioning of the European Union (the TFEU) (RLM-30).

2. Within the framework of the provisions set out in this Chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited.

Article 267

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give a judgement, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

Article 344

Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.

## B. TIMELINE OF KEY DATES

Date	Event
1 November 1999	<a href="#">Austria-Croatia BIT</a> enters into force
1 July 2013	Croatia accedes to the EU
18 September 2015	Croatian Parliament adopts the Conversion Law, converting RBHR Swiss Franc loans into Euro loans
3 March 2016	German <i>Bundesgerichtshof</i> makes its preliminary reference to the CJEU in the <i>Achmea</i> Arbitration
15	ICSID registers Raiffeisen's Request for Arbitration

September 2017	
19 September 2017	<a href="#">Opinion of Advocate General Wathelet in <i>Slowakische Republik v. Achmea BV</i>, Case C-284/16</a>
6 March 2018	CJEU issues the <a href="#">Achmea Judgment</a>
12 October 2018	<a href="#">UniCredit Decision</a>
15 January 2019	Declaration of the Representatives of the Governments of the Member States on the Legal Consequences of the Judgment of the Court of Justice in <i>Achmea</i> and on Investment Protection in the European Union (the <i>15 January 2019 Declaration</i> )
24 March 2020	<a href="#">UniCredit Reconsideration Decision</a>
29 May 2020	EU Termination Treaty
12 June 2020	<a href="#">Addiko Decision</a>

## V. BURDEN OF PROOF ON JURISDICTION

### A. THE PARTIES' POSITIONS

91. The Respondent argues that, based on accepted international practice, the Claimants bear the burden of proving the Tribunal's jurisdiction of their claims. In support, Croatia relies upon decisions of the ICSID tribunals in *Abaclat v. Argentina* and *Tulip v. Turkey*.<sup>13</sup>
92. The Claimants disagree, citing the Judgment of the International Court of Justice (the *ICJ*) in the *Fisheries Jurisdiction* case in support of their argument that neither side bears the legal burden of proving jurisdiction. The Claimants state, "each party bears the burden of proving the facts on which it relies, and the tribunal then considers these facts and the parties' legal arguments in deciding for itself whether jurisdiction exists."<sup>14</sup>

<sup>13</sup> Respondent's Memorial on Jurisdiction (the Respondent's Memorial), paras 5-6, citing *Abaclat and others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011 (*Abaclat v. Argentina*) (RLM-63), para 678; and *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issue, 5 March 2013 (*Tulip v. Turkey*) (RLM-64), para 48.

<sup>14</sup> Claimants' Counter-Memorial on Jurisdiction (the Claimants' Counter-Memorial), paras 123-125 citing *Fisheries Jurisdiction (Spain v. Canada)*, Judgment, 4 December 1998, [1998] ICJ Reports 432 (*Fisheries Jurisdiction*) (CLM-193), paras 36-38. See also Claimants' Counter-

## B. THE TRIBUNAL'S ANALYSIS AND DECISION

93. The Tribunal finds that, although each side bears the burden to prove the factual allegations and legal arguments it has advanced in relation to jurisdiction, neither Raiffeisen nor the Respondent bears the legal burden of proving jurisdiction here. As to the reasons, the Tribunal can do no better than quote the reasoning of the ICJ in the *Fisheries Jurisdiction* Judgment:<sup>15</sup>

*The Court points out that the establishment or otherwise of jurisdiction is not a matter for the parties but for the Court itself. Although a party seeking to assert a fact must bear the burden of proving it, this has no relevance for the establishment of the Court's jurisdiction, which is a "question of law to be resolved in the light of the relevant facts."*

*That being so, there is no burden of proof to be discharged in the matter of jurisdiction. Rather, it is for the Court to determine from all the facts and taking into account all the arguments advanced by the Parties, "whether the force of the arguments militating in favour of jurisdiction is preponderant, and to 'ascertain whether an intention on the part of the Parties exists to confer jurisdiction on it.'"*

94. The issue of jurisdiction here turns on the interpretation and application of the relevant articles of the [Austria-Croatia BIT](#) in the circumstances presented. This is properly the legal task of the Tribunal.

## VI. INTERPRETATION OF ARTICLE 11(2) OF THE AUSTRIA-CROATIA BIT

### A. THE PARTIES' POSITIONS

#### (1) Article 11(2) as a Conflict Clause

95. The Respondent's main argument is that [Article 11\(2\)](#) is a specific conflict clause that directs the Tribunal to give precedence to the EU *acquis* over the BIT. The Respondent states:

*Like any treaty, an intra-EU treaty has no self-standing legal basis under public international law independently from the legal effect given to it by the consent of its two contracting parties. If both contracting parties to an intra-EU treaty agree in the EU Treaties that the latter will take precedence*

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Memorial, paras 126-129, wherein the Claimants cite three investment arbitration cases: *Muhammet Çap and Sehil İnşaat Endüstri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Decision on Respondent's Objection to Jurisdiction, 13 February 2015 (CLM-201), paras 65-66, 119; *WNC Factoring Ltd. v. Czech Republic*, PCA Case No. 2014-34, Award, 22 February 2017 (CLM-160), paras 293, 310; and *UniCredit Bank Austria AG and Zagrebačka Banka d.d. v. Republic of Croatia*, ICSID Case No. ARB/16/31, Decision on the Respondent's Article 9 Objection to Jurisdiction, 12 October 2018 (the UniCredit Decision) (CLM-210), para 89.

<sup>15</sup> *Fisheries Jurisdiction*, paras 37-38 (citations omitted).

*over the former, there is no basis under public international law for a tribunal established under the bilateral treaty to ignore such a conflict rule.*<sup>16</sup>

96. Croatia asserts that, as a consequence, the Tribunal "can safely disregard as inapposite the entire smokescreen of case law presented by the Claimants dealing with whether the EU Treaties take precedence over bilateral investment treaties or the [ECT] pursuant to the VCLT or the residual rules of public international law."<sup>17</sup> Croatia describes Article 11(2) as "sav[ing] this Tribunal from having to consider the residual rules in [Article 30 of the VCLT](#),"<sup>18</sup> and argues that the cases cited by Raiffeisen, most of which are based on analyses of incompatibility under [Article 30\(3\) of the VCLT](#), are unhelpful.<sup>19</sup>
97. The Claimants' primary position is that text of [Article 11\(2\) of the BIT](#) refers to incompatibility, and, therefore, [Article 11\(2\)](#) requires the same test of compatibility between treaties as [Article 30\(3\) of the VCLT](#). Accordingly, the cases analyzing [Article 30\(3\) of the VCLT](#), or which otherwise apply a test of compatibility, remain relevant and persuasive in interpreting [Article 11\(2\) of the BIT](#).<sup>20</sup> Croatia implicitly concedes this, says Raiffeisen, by invoking [Article 30\(3\) of the VCLT](#) as an alternative argument in the context of the import of the *Achmea* Judgment and the 15 January 2019 Declaration (discussed in Section VI.A(2)a below) and accepting that an Article 30(3) analysis would lead to the same result as direct application of [Article 11\(2\)](#).<sup>21</sup>
98. RBI and RBHR find little utility in Croatia's attempt to differentiate [Article 11\(2\)](#) of the BIT from [Article 30\(3\) of the VCLT](#) on the basis that [Article 11\(2\)](#) refers not just to conflicting treaty norms but also expressly to the EU *acquis*. This is because the additional sources of the EU *acquis* cited by Croatia (discussed in Section VII.A(3) below) are irrelevant in the context of this case: the *Achmea* Judgment does not address ICSID arbitration and in any event cannot retroactively deprive the Tribunal of jurisdiction, and neither the 15 January 2019 Declaration nor the [General Agreement on Trade and Services](#) (the *GATS*) is part of the EU *acquis*.<sup>22</sup>

## (2) Alternative Conflict Rules

### *a. Article 30 of the VCLT*

99.

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<sup>16</sup> Respondent's Reply, para 21.

<sup>17</sup> Respondent's Post-Hearing Brief, para 17.

<sup>18</sup> Respondent's Post-Hearing Brief, para 26.

<sup>19</sup> Respondent's Memorial, para 26. See also Respondent's Post-Hearing Brief, para 41.

<sup>20</sup> Claimants' Rejoinder on Jurisdiction (the Claimants' Rejoinder), para 18.

<sup>21</sup> Claimants' Rejoinder, para 70.

<sup>22</sup> Claimants' Rejoinder, para 71. See also Claimants' Post-Hearing Brief, para 39.

Should the Tribunal not accept [Article 11\(2\) of the BIT](#) as the controlling *lex specialis* conflict clause, Croatia argues in the alternative that the residual conflict rules in [Article 30 of VCLT](#) lead to the same result – lack of jurisdiction.<sup>23</sup> Croatia relies on [Article 30\(2\)](#), which stipulates that "[w]hen a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail," and Article 30(3), which specifies that "the earlier treaty applies only to the extent its provisions are compatible ...."<sup>24</sup> In this respect, as discussed below, Croatia denies that the relevant treaties must share the same subject matter; rather, it is sufficient if the earlier treaty and later treaty cannot be applied simultaneously without breach of one or the other.<sup>25</sup> In the instant case, because the Tribunal's exercise of jurisdiction under [Article 9 of the BIT](#) would lead to Croatia and Austria violating their obligations under the TFEU, the BIT and the TFEU are necessarily incompatible under [Article 30\(3\) of the VCLT](#).<sup>26</sup>

## ***b. Conflict Clauses in EU Treaties***

100. Even if [Article 11\(2\) of the BIT](#) does not preclude the Tribunal's jurisdiction, the Respondent argues in the alternative that Article 4(3) of Treaty on the European Union (the *TEU*, and, together with the *TFEU*, the *EU Treaties*) contains a dovetailing conflict clause giving the EU Treaties primacy over other intra-EU treaties, including the [Austria-Croatia BIT](#).<sup>27</sup>
101. The Claimants respond that the "'principle' of 'primacy of EU law' on which Croatia relies is not a principle of international law at all," but an internal EU doctrine developed in CJEU jurisprudence.<sup>28</sup> The Claimants do not accept that Article 4(3) of the TEU is a dovetailing conflict clause.<sup>29</sup> The general recitation that EU Member States "shall take any appropriate measure ... to ensure the fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union" and "facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives" cannot automatically trump other specific treaty obligations. RBI and RBHR emphasize that "[n]owhere does [Article 4(3) of the TEU] refer to the primacy of EU law or provide that in the event of a conflict, EU law will take priority."<sup>30</sup>
102. Croatia also relies on Declaration 17 of the 2009 Treaty of Lisbon for the proposition that EU law has primacy and takes precedence over intra-EU BITs.<sup>31</sup> Declaration 17 provides in full:

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<sup>23</sup> Respondent's Memorial, paras 31, 34.

<sup>24</sup> VCLT (CLM-129), Article 30.

<sup>25</sup> Respondent's Memorial, para 131.

<sup>26</sup> Respondent's Memorial, para 32.

<sup>27</sup> Respondent's Memorial, para 54.

<sup>28</sup> Claimants' Post-Hearing Brief, para 176.

<sup>29</sup> Claimants' Post-Hearing Brief, para 180.

<sup>30</sup> Claimants' Rejoinder, para 55.

<sup>31</sup> Respondent's Post-Hearing Brief, para 25.

*The Conference [of EU Member States] recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law.*<sup>32</sup>

103. The Respondent characterizes Declaration 17 as "an agreement relating to the TEU and TFEU that was made between all the contracting parties in connection with the conclusion of those [T]reaties," which confirms the "cornerstone principle" of the primacy enshrined in the EU *acquis*.<sup>33</sup> Croatia contends that Declaration 17 is not limited to Member State domestic law, but expressly ties the principle of EU law primacy to CJEU case law.<sup>34</sup> Invoking [Article 31\(2\)\(a\) of the VCLT](#), Croatia argues that Declaration 17 "must be included in the interpretation of the TEU and TFEU."<sup>35</sup>

104. The Claimants disagree. They contend that the principle of the primacy of EU law set out in Declaration 17—which expressly refers to "primacy over the law of Member States"—concerns the primacy of EU law over domestic law, not over extraneous treaties that exist and operate outside EU law.<sup>36</sup> Given that Declaration 17 accompanied the 2009 Treaty of Lisbon, which amended the EU Treaties already in force, the Claimants highlight that it cannot accurately be said that Declaration 17 was made in connection with the "conclusion" of the EU Treaties.<sup>37</sup> In any event, say the Claimants, there is no basis for extending the principle of EU law primacy to the level of general international law.<sup>38</sup> Even if there were, the primacy principle would not alter the substantially similar legal analysis under [Article 11\(2\) of the BIT](#) or [Article 30\(3\) of the VCLT](#),<sup>39</sup> because Croatia would still need to meet the test of incompatibility and "[i]f there is no incompatibility, there is nothing in relation to which the primacy of EU law can operate."<sup>40</sup>

105. In its *Amicus Curiae* Brief, the EC takes the position that EU law prevails over all possible conflict rules applicable to [Article 9 of the BIT](#) and, because Article 9 is incompatible with EU law, the Tribunal must decline jurisdiction.<sup>41</sup> In the alternative, relying on [Article 30 and 59 of the VCLT](#), the EC argues that the Tribunal lacks jurisdiction because the [Austria-Croatia BIT](#) has been impliedly terminated.<sup>42</sup>

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<sup>32</sup> Treaty of Lisbon, Declaration 17 (RLM-73).

<sup>33</sup> Respondent's Memorial, paras 124-125.

<sup>34</sup> Respondent's Post-Hearing Brief, para 25.

<sup>35</sup> Respondent's Memorial, para 125.

<sup>36</sup> Claimants' Rejoinder, para 56; Claimants' Post-Hearing Brief, para 177.

<sup>37</sup> Claimants' Counter-Memorial, para 110; Claimants' Rejoinder, para 57; Claimants' Post-Hearing Brief, para 178.

<sup>38</sup> Claimants' Counter-Memorial, para 111.

<sup>39</sup> Claimants' Rejoinder, para 58.

<sup>40</sup> Claimants' Counter-Memorial, para 112.

<sup>41</sup> Amicus Curiae Brief of the European Commission (the EC Amicus Brief), Section 4.

<sup>42</sup> EC Amicus Brief, Section 3.

### (3) The Meaning of "incompatible" under Article 11(2) of the BIT

106. The Parties firmly disagree as to the methodology for determining whether the BIT is incompatible or compatible with the EU *acquis* for the purposes of [Article 11\(2\)](#).
107. The Claimants' main position is that the test of incompatibility has a threshold requirement, based on [Articles 30\(3\) and 59 of the VCLT](#), namely that the treaties to be compared have the same subject matter.<sup>43</sup> Only if that threshold requirement is met should the Tribunal proceed to determine the incompatibility of the relevant treaties, here the [Austria-Croatia BIT](#) and the EU Treaties.
108. RBI and RBHR contend that because the BIT and the EU Treaties do not address the same subject matter, the threshold requirement is not met and thus the treaties are not incompatible. Therefore, [Article 9 of the BIT](#), the investor-state arbitration clause, remains applicable. The Claimants emphasize that many investment treaty tribunals have consistently found that intra-EU BITs and the Energy Charter Treaty (the *ECT*) do not have the same subject matter as the EU Treaties.<sup>44</sup>
109. Croatia charges Raiffeisen with applying the wrong test for incompatibility under [Article 30 of the VCLT](#). Contending that it is not a necessary first step to examine the sameness of subject matter, Croatia urges the Tribunal to proceed directly to test whether the relevant treaty obligations in the earlier and later treaties can "be complied with simultaneously" without a state party breaching one of the treaties.<sup>45</sup> The tribunals in the cases cited by the Claimants, which found that intra-EU BITs and the ECT do not have the same subject matter as the EU Treaties, did not take into account that "two treaties can be incompatible without both treaties having substantially the same provisions."<sup>46</sup> In particular, the Respondent relies on the reports of the International Law Commission (the *ILC*) forming the *travaux* of the VCLT to support its claim that [Article 30 of the VCLT](#) does not require the sameness of subject matter in measuring incompatibility.<sup>47</sup>
110. The Claimants respond that the VCLT *travaux* go beyond the ILC reports and include all the material of the United Nations Conference on the Law of Treaties (the *Conference*) from 1968 to 1969, as the Conference essentially used the ILC Draft Articles (and the ILC reports) as the basis for negotiating the final text of the VCLT.<sup>48</sup> The Conference adopted the version of what would become Article 30, which included reference to sameness of subject matter, and the negotiators made clear that the sameness of subject matter requirement should be construed strictly.<sup>49</sup>
111. In reply, Croatia refers back to another ILC report to show that the ILC considered the subject matter criterion to be only an exercise in labelling and categorizing treaties, and that the criterion

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<sup>43</sup> Claimants' Rejoinder, para 24

<sup>44</sup> Claimants' Counter-Memorial, para 67; Claimants' Rejoinder, para 25; Claimants' Post-Hearing Brief, para 31.

<sup>45</sup> Respondent's Memorial, para 32.

<sup>46</sup> Respondent's Memorial, para 132.

<sup>47</sup> Respondent's Memorial, paras 134-135.

<sup>48</sup> Claimants' Counter-Memorial, para 62.

<sup>49</sup> Claimants' Counter-Memorial, para 63.

seems "already fulfilled if two different rules or sets of rules are invoked in regard to the same matter, or if, in other words, as a result of interpretation, the relevant treaties seem to point to different directions in their application by a party."<sup>50</sup> Engaging in the exercise of labelling and categorizing treaties would necessarily mean that the EU Treaties could not conflict with a treaty in any of the areas they regulate, leading to the absurd result that the EU Treaties could be incompatible only with other treaties establishing other regional economic integration organizations.<sup>51</sup>

112. RBI and RBHR do not accept that subject matter is merely a labelling exercise. The Claimants contend that "[s]ameness of subject-matter is a textual requirement ... and any difficulties associated with identifying subject-matter, or the practice of concluding treaties that might span one or more subject-matters, does not render this textual requirement meaningless," and that incompatibility depends on treaty content instead.<sup>52</sup>
113. The Tribunal pauses to note that the Parties ultimately agreed, in effect, that the test of incompatibility is whether the obligations in the two relevant treaties are such that compliance with one obligation would put a state in non-compliance with the other.<sup>53</sup>

#### (4) The Import of "in force at any given time"

114. The Parties also disagree on how to interpret the phrase "in force at any given time" in [Article 11\(2\) of the BIT](#), invoking arguments that they essentially reprise in connection with the retroactive applicability of the *Achmea* Judgment (discussed at Section VII.A(1)c below).
115. Raiffeisen's position is that the phrase "in force at any given time" cannot mean in force "at any time in the past, present or future."<sup>54</sup> The phrase must instead refer to a specific moment in time as relevant to a particular issue, thus calling upon applicable rules of international law, including, most importantly, the critical date doctrine.<sup>55</sup> In this case, for purposes of [Article 9 of the BIT](#), the critical date is when an irrevocable agreement to arbitrate was formed, which was 15 September 2017, the date on which ICSID registered the Claimants' Request for Arbitration.<sup>56</sup>
116. The Claimants emphasize the importance of the words "in force" in [Article 11\(2\)](#):

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<sup>50</sup> Respondent's Reply, para 25, citing ILC, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, in Report of the Study Group of the International Law Commission (A/CN.4/L.682) dated 13 April 2006 (the ILC Fragmentation Report) (RLM-100), paras 21-23.

<sup>51</sup> Respondent's Reply, para 26.

<sup>52</sup> Claimants' Rejoinder, para 22.

<sup>53</sup> Claimants' Counter-Memorial, para 48; Claimants' Post-Hearing Brief, paras 18-19; Respondent's Post-Hearing Brief, para 39; Tr. 72:17-20 (Volterra).

<sup>54</sup> Claimants' Post-Hearing Brief, para 201.

<sup>55</sup> Claimants' Post-Hearing Brief, paras 43, 202. See also Claimants' Rejoinder, para 88.

<sup>56</sup> Claimants' Rejoinder, para 85.

The words "in force," which immediately follow the words "legal acquis of the European Union (EU)," can only refer to the acquis as a body of law as it stood – was "in force" – at a given point in time. [Article 11\(2\)](#) refers to the state of the acquis "in force" at a point in time – which is also the only logical and natural reading: one can assess compatibility only against a concrete state of law, not against a fluid and indeterminate notion of legal rules that are ever subject to subsequent change and so can never be captured at the point in time when jurisdiction is established.<sup>57</sup>

117.

According to Raiffeisen, this interpretation properly accounts for the necessarily evolving nature of the EU *acquis* :

*The acquis is by its nature and in its context something that changes from time to time. When [Article 11\(2\)](#) refers to the acquis "in force at any given time," it refers to the body of EU law that is in force at that time – the given time – not at some future (or past) time. The term "acquis" does not refer to a future body of law, let alone a future body of law capable of producing retroactive legal effects.*<sup>58</sup>

118. The Claimants emphasize that the tribunals in both *Addiko* and *UniCredit* reached the conclusion that analysis of compatibility requires an assessment of the evolving *acquis* actually in force on the critical date.<sup>59</sup> The *Addiko* tribunal placed particular emphasis on the phrase "in force at any given time," noting that the "latter point about a 'given time' qualifies the former point about the scope of the relevant *acquis* (that it be the *acquis* then 'in force')," and so requires that "the temporal inquiry must be into the state of the *acquis* itself (i.e., what elements were or were not in force as part of the *acquis*, as of a particular date)."<sup>60</sup>

119. The Respondent rejects as "untenable" the Claimants' suggestion that "a snapshot in time is possible" to apply Article 11(2).<sup>61</sup> To the extent the phrase "at any given time" is relevant, says Croatia, "the language is extensive, not restrictive:"

*To the extent that the Contracting Parties intended these words to add anything to the meaning of Article 11(2), they manifestly intended to give Article 11(2) as broad an application in time as possible. In the words of Sir Francis, the Claimants' legal expert at the Hearing, the term "at any given time" is "not always a very precise formula." Sir Francis confirmed that "it could be the date on which the judgment was given. It could be some other date which would be relevant for the purposes of these proceedings."*<sup>62</sup>

120. The Respondent contends that "in force at any given time" is a "commonly used phrase" which, when read in accordance with its ordinary meaning, "makes it clear that this language is used *ex abundanti cautela* to ensure the broadest possible application of the EU *acquis*."<sup>63</sup> This

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<sup>57</sup> Claimants' Post-Hearing Brief, para 199.

<sup>58</sup> Claimants' Rejoinder, para 87.

<sup>59</sup> Claimants' Observations on *Addiko* and *UniCredit*, paras 4-9.

<sup>60</sup> Claimants' Observations on *Addiko* and *UniCredit*, paras 6-7, citing *Addiko* Decision, para 215 (CLM-250).

<sup>61</sup> Respondent's Post-Hearing Brief, para 54, citing Tr. Day 3, 765:4-8 (Schwarz).

<sup>62</sup> Respondent's Post-Hearing Brief, para 57, citing Tr. Day 2, 467:3-8 (Sir Francis).

interpretation, says Croatia, accords with the purpose of Article 11(2) to subordinate the BIT to the *acquis*, while the *Addiko* tribunal's "freeze-frame approach" reflects "an anachronistic misconception of the EU *acquis* now authoritatively confirmed to be incorrect" that would "perversely lead" the Contracting Parties to violate the *acquis* "and entirely deprive Article 11(2) of its purpose."<sup>64</sup>

121. The Claimants reject the Respondent's interpretation, which the Claimants say depends entirely on reading the words "at any given time" to constitute an embedded conditionality:

*Croatia argues precisely that any event, regardless of when it occurs – such as the CJEU's judgment in Achmea or the 15 January Declaration – that purports to clarify the legal position at the critical date is capable of triggering Article 11(2) and depriving the Tribunal of jurisdiction. Croatia seems to admit as such when it says that the reference to the *acquis* "'at any given time' precisely accommodates the present situation in which the CJEU has ... divined, clarified and confirmed the law as it stood at the critical date."*<sup>65</sup>

122. The Claimants emphasize that the Respondent has given its irrevocable consent to ICSID arbitration in [Article 9\(2\)\(a\) of the Austria-Croatia BIT](#), and has agreed under [Article 25\(1\) of the ICSID Convention](#) not to "withdraw its consent unilaterally."<sup>66</sup> According to the Claimants, Croatia's proposed interpretation of Article 11(2) is inconsistent with these undertakings.

123. Croatia charges the Claimants with misrepresenting its position, which "does not depend on the terms 'at any given time' in Article 11(2)" nor "on [Article 11\(2\) of the BIT](#) being read as if it constitutes an 'embedded conditionality' in the sense that it can be triggered after an agreement to arbitrate has been established."<sup>67</sup>

124. Croatia further contends that the Claimants "confuse the irrevocable nature of a Party's consent to arbitration with the limits of that consent,"<sup>68</sup> arguing that because its consent to arbitration has always been subject to the requirement of compatibility with the EU *acquis* as per [Article 11\(2\) of the BIT](#), this consent no longer existed as of 1 July 2013, when Croatia acceded to the EU. Croatia therefore insists that "vitiating [of consent] has never been the issue."<sup>69</sup> In the words of Croatia's counsel at the Hearing:

*As I have submitted previously, the scope of Austria and Croatia's mutual offers in the BIT of ICSID Arbitration were explicitly limited by agreement to circumstances where ICSID Arbitration, under the BIT, was compatible with the EU *acquis*. Thus, from the moment that Croatia acceded to the EU on 1 July 2013, ICSID Arbitration, by an Austria[n] investor against Croatia under the BIT, and*

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<sup>63</sup> Respondent's Observations on Addiko and UniCredit, para 19.

<sup>64</sup> Respondent's Observations on Addiko and UniCredit, para 19.

<sup>65</sup> Claimants' Post-Hearing Brief, para 207, citing Respondent's Memorial, paras 47, 81 and Respondent's Post-Hearing Brief, para 56.

<sup>66</sup> Claimants' Post-Hearing Brief, paras 187-193. See also Claimants' Counter-Memorial, paras 130-142.

<sup>67</sup> Respondent's Post-Hearing Brief, para 30.

<sup>68</sup> Respondent's Reply, para 46.

<sup>69</sup> Respondent's Reply, paras 46-48.

*a Croatian investor against Austria under the BIT, was no longer compatible with the EU acquis, and, therefore, no irrevocable consent to ICSID Arbitration could have been created or could have existed under the BIT.*<sup>70</sup>

125.

The Claimants assert that there is little difference between impermissible revocation or withdrawal of consent to arbitration, on the one hand, and Croatia's assertion that a purported condition can be triggered by post-consent events, on the other hand. The Claimants reject the Respondent's attempt to characterize [Article 11\(2\)](#) as somehow being a "condition precedent" to consent.<sup>71</sup> According to Raiffeisen, "[t]he critical element in both contexts is that once consent is perfected, it cannot subsequently be altered or negated."<sup>72</sup> RBI and RBHR add:

*The implication of Croatia's position is that any decision or award by the Tribunal would eternally be susceptible to challenge. Croatia could arguably even claim restitution of any moneys paid pursuant to a pecuniary obligation under a final award, if at some undetermined point its "conditional" consent may retroactively no longer amount to consent. This would be an absurd result that completely undermines notions of legal certainty.*<sup>73</sup>

126.

The Claimants conclude that, ultimately, their interpretation of [Article 11\(2\)](#) is the only interpretation that is consistent with: first, the irrevocable consent extended by Croatia in [Article 9 of the BIT](#) and [Article 25\(1\) of the ICSID Convention](#); second, the treaty interpretation principle of effectiveness, and; third, the object and purpose of the BIT to promote and protect investment through protection of legal certainty.<sup>74</sup> It is also the only interpretation, the Claimants say, that "recognizes the changing content of EU law, rather than freezing the content of the *acquis* as it stood on the date the [BIT] entered into force – while at the same time safeguarding the Tribunal's jurisdiction once the proceedings have been initiated and consent has been crystallized."<sup>75</sup>

## B. THE TRIBUNAL'S ANALYSIS AND DECISION

### (1) Preliminary Observations

127. The Parties have presented the Tribunal with the difficult task of interpreting [Articles 9 and 11\(2\) of the Austria-Croatia BIT](#) to determine jurisdiction, with related consideration of the ICSID Convention and the EU Treaties in the wake of the high-profile *Achmea* Judgment. As found above, neither side carries the burden of proof. It falls squarely on the Tribunal to apply the international

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<sup>70</sup> Tr. Day 1, 60:9-20 (Volterra).

<sup>71</sup> Claimants' Post-Hearing Brief, paras 184-186, 189.

<sup>72</sup> Claimants' Counter-Memorial, para 138; Claimants' Rejoinder, para 80.

<sup>73</sup> Claimants' Rejoinder, para 83.

<sup>74</sup> Claimants' Rejoinder, paras 89-96. See also Claimants' Post-Hearing Brief, paras 200 et seq.

<sup>75</sup> Claimants' Post-Hearing Brief, para 210.

law rules and principles of treaty interpretation to assess whether or not it has jurisdiction.

128. There can be no question of the Tribunal's power to determine its own jurisdiction pursuant to [Article 9 of the BIT](#) and [Article 41\(1\) of the ICSID Convention](#). Where jurisdiction is found, the Tribunal has not only the right but also the affirmative responsibility to exercise that jurisdiction. It follows that the Tribunal has the power and responsibility to interpret [Article 11\(2\) of the BIT](#), which is at the very core of the jurisdictional dispute.
129. In so doing, the Tribunal underscores that it has carefully considered the exhaustive written and oral submissions of the Parties and their legal experts on the myriad of issues the Parties have chosen to present in this arbitration. In this Decision, the Tribunal addresses what it considers to be the necessary dispositive issues. The absence of an explicit discussion of a particular issue does not mean that the Tribunal did not give that issue due consideration.
130. The Tribunal has benefitted in particular from the Parties' observations on the *UniCredit* and *Addiko* Decisions, and from those decisions themselves, but without compromising its responsibility to interpret [Article 11\(2\) of the BIT](#) independently.

## (2) Article 11(2) as a Conflict Clause

131. The Tribunal agrees with the Respondent that [Article 11\(2\)](#) is a *lex specialis* conflict clause. It is undisputed that the [Article 11\(2\)](#) text is unique and does not appear in the ECT or in the other intra-EU BITs underlying the series of jurisdiction decisions cited by the Parties.<sup>76</sup> To date, only the *UniCredit* and *Addiko* ICSID tribunals have interpreted [Article 11\(2\)](#), both holding in favor of jurisdiction.
132. In light of this finding, the Tribunal need not address the Parties' extensive arguments based on the residual conflict rules in [Articles 30 and 59 of the VCLT](#) and on the application of the primacy of the EU Treaties to resolve conflicts. The conflict rule applicable in this case is [Article 11\(2\) of the BIT](#).
133. Consequently, the Tribunal also need not decide the vigorously disputed issue of whether interpretation of treaty incompatibility under [Article 30 of the VCLT](#) requires a finding that the relevant two treaties have the same subject matter.

## (3) The Meaning of "incompatible" under Article 11(2) of the BIT

- 134.

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<sup>76</sup> Respondent's Post-Hearing Brief, paras 1, 15.

As noted, the Parties effectively agree that the test of incompatibility is whether the obligations in the two treaties are such that compliance with one obligation would put a state in non-compliance with another.<sup>77</sup> The Tribunal adopts this test and applies it below in its analysis of incompatibility under [Article 11\(2\) of the BIT](#).

135.

As noted above, the Parties disagree as to whether the proper application of [Article 11\(2\)](#) includes a threshold requirement, namely that the treaties to be compared have the same subject matter. Regardless of whether such a requirement exists under [Articles 30](#) and [59 of the VCLT](#), the Tribunal cannot accept the Claimants' argument that the same prerequisite would apply in the context of [Article 11\(2\)](#) of the BIT. That position is not supported by the text of [Article 11\(2\)](#); unlike [Articles 30](#) and [59 of the VCLT](#), it contains no reference to treaties "relating to the same subject-matter."

#### (4) The Import of "in force at any given time"

136.

At this juncture, the text of [Article 11\(2\) of the BIT](#) merits repeating:

*The Contracting Parties are not bound by the present Agreement insofar as it is incompatible with the legal acquis of the European Union (EU) in force at any given time.*<sup>78</sup>

137.

In broad brush, [Article 11\(2\)](#) is a negotiated conflict clause reflecting the agreement of Austria and Croatia that the EU Treaties will prevail over the BIT. The consequence of any incompatibility between the treaties is that Austria and Croatia will not be bound by the incompatible provisions in the BIT.

138. There is one express qualification to this EU law primacy, however. This is the temporal qualification: incompatibility of the BIT is tested against the EU *acquis* "in force at any given time."

139. The Tribunal notes the Respondent's assertion that the phrase "in force at any given time" is a "commonly used phrase" used by Austria and Croatia "*ex abundanti cautela* to ensure the broadest possible application of the EU *acquis*."<sup>79</sup> Croatia offers no support for this assertion, and the Tribunal is not aware that the phrase is commonly used in treaties.

140. Regardless, the Tribunal finds it helpful to break down this temporal clause into two parts for interpretation: first, the words describing the EU *acquis* as "at any given time" and, second, the immediately preceding two words "in force."

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<sup>77</sup> Claimants' Counter-Memorial, para 48; Claimants' Post-Hearing Brief, paras 18-19; Respondent's Post-Hearing Brief, para 39; Tr. Day 1, 72:17-20 (Volterra).

<sup>78</sup> BIT (C-4), Article 11.

<sup>79</sup> Respondent's Observations on Addiko and UniCredit, para 19.

141. The Tribunal considers that, whether looking to ordinary meaning in context under [Article 31 of the VCLT](#) or to the critical date doctrine under international law, the words "at any given time" cannot reasonably mean "at any time whatsoever." The words "at any given time" must refer to the specific point in time that is relevant to the issue in dispute. The issue in dispute here is the Tribunal's jurisdiction or, more accurately, whether the Parties have effectively and irrevocably consented to ICSID arbitration for purposes of [Article 9 of the BIT](#), the ICSID arbitration provision.
142. The Parties agree, and it is trite law, that a state's standing future consent to arbitration in a BIT is perfected upon the investor's effective initiation of an arbitration. Pursuant to Rule 6 of the ICSID Institution Rules, an ICSID arbitration is "deemed to have been instituted" under the ICSID Convention on the date the Secretary-General registers the request for arbitration.
143. In the present case, Croatia provided its standing future consent to ICSID arbitration as of 1 November 1999, the date the [Austria-Croatia BIT](#) entered into force. RBI and RBHR consented to ICSID arbitration and engaged Croatia's consent on 15 September 2017, the date the ICSID Secretary-General registered their Request for Arbitration. Accordingly, as recognized by the Parties, the critical date against which to measure jurisdiction for purposes of [Article 9 of the BIT](#) is 15 September 2017.<sup>80</sup>
144. The interpretive inquiry does not stop here. The text in [Article 11\(2\) of the BIT](#) goes beyond a reference to the EU *acquis* "at any given time." The full operative phrase in Article 11(2) covers the *acquis* "in force at any given time" (emphasis added). In the face of this full operative phrase "in force at any given time," the Tribunal finds the critical interpretive question to be whether [Article 9 of the BIT](#) was incompatible with the EU *acquis in force* as at the ICSID registration date of 15 September 2017.
145. The Tribunal pauses to address the assertion in the Introduction to the Respondent's Post-Hearing Brief:
- [Article 11\(2\)](#) means what it says: neither Austria nor the Respondent is bound by anything in the BIT insofar as it is incompatible with the EU *acquis*. Nothing more; nothing less.*<sup>81</sup>
- This assertion is not correct. There is more in [Article 11\(2\)](#) – the temporal qualification. [Article 11\(2\)](#) says that neither Austria nor Croatia is bound by BIT provisions that are incompatible with the EU *acquis* "in force at any given time."
146. The temporal qualification requires interpretation, along with the rest of the text of [Article 11\(2\)](#).

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<sup>80</sup> Claimants' Post-Hearing Brief, para 195; Respondent's Memorial, para 93 note 103; Respondent's Reply, para 52; Tr. Day 1, 119:6-10 (Coop).

<sup>81</sup> Respondent's Post-Hearing Brief, para 2.

In this regard, the Tribunal finds persuasive the *Addiko* tribunal's interpretation of the temporal phrase, that "the latter point about a 'given time' qualifies the former point about the scope of the relevant *acquis* (that it be the *acquis* then 'in force')." <sup>82</sup> In their Observations on *UniCredit* and *Addiko*, the Claimants note that the *Addiko* tribunal "underscored the distinction between the actual wording of [Article 11\(2\)](#) and the interpretation that might result "if the phrase 'at any given time' were to qualify the reference to incompatibility, rather than the reference to the *acquis*," in this way:

*The question in that case might be whether the acquis, as it has evolved in toto by the date of the Tribunal's assessment, compels a finding of incompatibility such as to release the Parties from obligations otherwise imposed by the BIT. By contrast, under the actual placement of the phrase "at any given time" (referring to "the legal acquis ... in force at any given time"), the temporal inquiry must be into the state of the acquis itself (i.e., what elements were or were not in force as part of the acquis, as of a particular date).* <sup>83</sup>

147.

Returning to the touchstone of the VCLT, the Tribunal finds that Raiffeisen's interpretation is consistent with the words "in force at any given time" used in [Article 11\(2\)](#), when read "in their context and in the light of [the treaty's] object and purpose." <sup>84</sup> The object and purpose of the BIT is the promotion and protection of investments of parties such as Raiffeisen made in the territory of Croatia. <sup>85</sup> In the words of Raiffeisen, "[c]reating and maintaining legal certainty is part of what it means to promote and protect investment." <sup>86</sup> The Tribunal does not accept the Respondent's charge that the Claimants have made "a generic incantation" of such principles to "create consent where none has ever crystallized." <sup>87</sup> Croatia's interpretation of [Article 11\(2\)](#) is patently inconsistent with the fundamental international law principles of legal certainty and good faith. Although the EU *acquis*, like all bodies of law, must and does evolve over time, it is critically important for those subjected to the law, to be able to know the law in force at any given time. This is particularly the case for purposes of fixing jurisdiction for resolution of compliance disputes.

148.

Finally, in similar vein, the Tribunal cannot accept Croatia's position, repeated at the Hearing, that compatibility with the *acquis* under [Article 11\(2\)](#) is a condition precedent or precondition to Croatia's consent to arbitration under [Article 9](#). <sup>88</sup> As stated by the tribunal in *UniCredit* :

*[Article 9](#) can be reconciled fully with Article 11 if the "at any given time" language of Article 11 means that incompatibility with the EU acquis is measured for purposes of [Article 9](#) at the time the request for arbitration is submitted and the State's consent becomes operative. ... The Tribunal therefore concludes that the only conditionality that [Article 11\(2\)](#) of the BIT could bring to bear*

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<sup>82</sup> Addiko Decision (CLM-250), para 215.

<sup>83</sup> Claimants' Observations on UniCredit and Addiko, para 7, citing Addiko Decision (CLM-250), para 215 (emphasis in original).

<sup>84</sup> VCLT (CLM-129), Article 31(3).

<sup>85</sup> BIT (C-4), Preamble.

<sup>86</sup> Claimants' Post-Hearing Brief, para 214.

<sup>87</sup> Respondent's Post-Hearing Brief, para 12.

<sup>88</sup> Tr. Day 1, 53:7-10 (Volterra); Tr. Day 1, 63:3-15 (Volterra); Tr. Day 3, 667:1-3 (Volterra); Tr. Day 3, 669:19-22 (Volterra).

on [Article 9](#) would be if, at the time a claim is submitted, there is demonstrated inconsistency between the irrevocable offer made by the Respondent for arbitration and the EU *acquis* by virtue of decisions or conduct that has occurred prior to that date.<sup>89</sup>

149. Croatia's argument is also inconsistent with [Article 25\(1\) of the ICSID Convention](#), which provides: "When the parties have given their consent, no party may withdraw its consent unilaterally." As the tribunal in *Ampal v. Egypt* rightly concluded:

*Article 25(1) of the ICSID Convention is very clear. The jurisdiction of the Centre is to be assessed at the time that jurisdiction is invoked, which is when the investor's Request for Arbitration is registered by the Centre. When jurisdiction has crystallized, "no Party may withdraw its consent unilaterally," says plainly Article 25(1).*

*As the Egypt-US Treaty and its Protocol must be read in the light of the ICSID Convention, the Tribunal finds that there cannot be an embedded conditionality in the Treaty which could be triggered after the submission of the dispute to arbitration.*<sup>90</sup>

150. For these reasons, the Tribunal finds that the analysis of incompatibility under [Article 11\(2\)](#) must take into account the EU *acquis* as it was in force as at the ICSID registration date of 15 September 2017.

## VII. WHETHER ARTICLE 9 OF THE BIT IS INCOMPATIBLE WITH ARTICLES 276 AND 344 OF THE TFEU

### A. THE PARTIES' POSITIONS

#### (1) The *Achmea* Judgment and its Effect

##### *a. Whether the Achmea Judgment is Binding in this Proceeding*

151. According to the Respondent, the CJEU in its *Achmea* Judgment decided that for EU Member States to create courts or tribunals insulated from the EU legal regime and review by the CJEU is violative of Articles 267 and 344 of the TFEU. Croatia relies specifically on the CJEU's holding that:

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<sup>89</sup> UniCredit Decision (CLM-210), paras 120, 124.

<sup>90</sup> *Ampal-American Israel Corp. and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction, 1 February 2016 (*Ampal v. Egypt*) (CLM-179), paras 168-169.

*Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the [[Netherlands-Slovak Republic BIT](#)], under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.*<sup>91</sup>

152. Noting the agreement of the Parties' legal experts—Professor Craig for the Respondent and Sir Francis for the Claimants—that CJEU judgments conclusively and bindingly interpret the EU Treaties and the other norms of the EU *acquis*, the Respondent contends that this agreement "should suffice for the Tribunal to conclude that Article 9 of the BIT does not bind the Respondent and consequently to decline jurisdiction."<sup>92</sup>

153. Croatia describes this arbitration as the realization of the CJEU's fears concerning the risks that intra-EU BITs pose to the autonomy of the EU legal order:

*First, there is the risk that an arbitral tribunal established under intra-EU BITs may misinterpret an EU Member State's obligations under the EU Treaties and render a binding award that is incompatible with the respondent State's international legal obligations under the EU Treaties. Second, there is the risk that the case law of such tribunals may snowball into a body of perceived authority on the international legal obligations under the EU Treaties that is used to contravene even the binding interpretations of the CJEU itself.*<sup>93</sup>

Croatia accordingly urges the Tribunal to disregard the intra-EU BIT tribunal decisions cited by Raiffeisen and to abide by the CJEU's *Achmea* Judgment instead.

154. In contrast, the Claimants urge the Tribunal to exercise its power and responsibility to be the judge of its own jurisdiction by interpreting the instruments creating this jurisdiction.<sup>94</sup> They rely on [Article 41\(1\) of the ICSID Convention](#), which provides that a tribunal "shall be the judge of its own competence."<sup>95</sup>

155. According to Raiffeisen, the CJEU interprets the EU *acquis* for internal EU purposes, not for international tribunals in extraneous proceedings not governed by the EU or its institutions. In sum, for the further reason that the CJEU has not determined the compatibility of the [Austria-Croatia BIT](#) with the EU Treaties, the Claimants take the position that the Tribunal owes no deference to the positions taken by the CJEU or the EC.<sup>96</sup>

156. In its *Amicus Curiae* Brief, the EC accepts that this Tribunal has competence to rule on its own jurisdiction, including "to analyse possible obstacles to the validity of the offer to arbitrate, and the

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<sup>91</sup> *Achmea* Judgment (RLM-31), para 62.

<sup>92</sup> Respondent's Reply, paras 66-67.

<sup>93</sup> Respondent's Reply, para 78

<sup>94</sup> Claimants' Counter-Memorial, paras 159-160; Claimants' Post-Hearing Brief, paras 36-37.

<sup>95</sup> Claimants' Post-Hearing Brief, para 36.

<sup>96</sup> Claimants' Rejoinder, para 104.

existence and validity of consent to arbitrate."<sup>97</sup> The EC goes on to argue that the CJEU's *Achmea* Judgment is an authoritative interpretation of EU law which binds the Tribunal in this intra-EU arbitration. Under the "broad scope of application" of the *Achmea* Judgment, Articles 267 and 344 of the TFEU "preclude any intra-EU investment arbitration"<sup>98</sup> and, as a "legal consequence," the offers of Croatia and Austria "to enter into investment arbitration [are] no longer valid since the accession of Croatia to the European Union ... on 1 July 2013."<sup>99</sup>

157. Again, the Claimants disagree. Even if the *Achmea* Judgment were to have binding effect, say the Claimants, the paucity of the reasoning leaves the *Achmea* Judgment unpersuasive and would justify the Tribunal's adopting a narrow interpretation of the Judgment.<sup>100</sup> RBI and RBHR describe the *Achmea* Judgment as

*remarkably terse and superficial in its reasoning and does not engage in any reasoned, detailed analysis of important countervailing principles of EU law (such as legal certainty, proportionality, or the protection of existing and fundamental rights). Further, it all but ignores the much more comprehensive and careful reasoning of the Advocate General, who reached the opposite conclusion.*<sup>101</sup>

158. The Claimants emphasize the interpretive inconsistencies they perceive in the *Achmea* Judgment. The CJEU rejected the analysis in Advocate General Wathelet's opinion (the *Achmea Wathelet Opinion*) that: (a) Article 344 of the TFEU only applies to disputes between EU Member States, and not between private parties and a Member State; and (b) Article 267 of the TFEU, which provides for preliminary references on questions of EU law from EU national courts to the CJEU, cannot be read to prohibit submission of a dispute to a court or tribunal to which that provision does not apply, meaning courts or tribunals that are not EU national courts. However, if the CJEU's rejection of this analysis by Advocate General Wathelet is correct, then the *Achmea* Judgment should equally prohibit submission of disputes by EU Member States to any forum other than EU national courts; yet the CJEU has expressly allowed intra-EU commercial arbitration. Additionally, the CJEU did not distinguish intra-EU investment arbitration from extra-EU investment arbitration or court proceedings, all of which could equally potentially raise questions of EU law.<sup>102</sup>

159. In response, the Respondent asserts that the Claimants' "subjective and unfounded criticism of the *Achmea* Judgment as 'terse and superficial in its reasoning' demonstrates their lack of understanding of longstanding CJEU case law and the principles of the EU *acquis* that underpin the relevant provisions of the EU Treaties."<sup>103</sup> Croatia insists that the *Achmea* Judgment is by definition binding:

*Whether or not the Claimants find the Achmea Judgment convincing is irrelevant. The interpretation of Articles 267 and 344 of the TFEU by the CJEU is binding on both Contracting*

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<sup>97</sup> EC Amicus Brief, para 14.

<sup>98</sup> EC Amicus Brief, Section 1 (emphasis in original).

<sup>99</sup> EC Amicus Brief, para 3.

<sup>100</sup> Claimants' Rejoinder, para 125; Claimants' Post-Hearing Brief, paras 170-172.

<sup>101</sup> Claimants' Rejoinder, para 105.

<sup>102</sup> Claimants' Counter-Memorial, paras 155-157.

<sup>103</sup> Respondent's Post-Hearing Brief, para 64.

*Parties to the BIT as a matter of public international law.*<sup>104</sup>

## ***b. The Scope of Application of the Achmea Judgment***

160. The Parties also disagree as to the scope of application of the *Achmea* Judgment, including whether it applies to ICSID arbitration.

161. The Respondent takes the position that "[i]t is evident that the decision of the ECJ [in *Achmea*] applies to all investor-State arbitration clauses in intra-EU BITs. Its ruling [is] in no way qualified or limited."<sup>105</sup>

162. The Claimants consider this position to rest on "unjustifiably broad readings" of the *Achmea* Judgment.<sup>106</sup> They put substantial emphasis on the fact that the CJEU in the *dispositif* of the Judgment specifically referred to

*a provision in an international agreement concluded between Member States, such as Article 8 of the [BIT], under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.*<sup>107</sup>

163. The Claimants recount that the German *Bundesgerichtshof* framed the original inquiry to the CJEU to be whether "Article 344 TFEU preclude[s] the application of a provision in a bilateral investment protection agreement between Member States of the European Union (a so-called intra-EU BIT)," but the CJEU itself added the qualifying term "such as" in its Judgment.<sup>108</sup> In other words, according to Raiffeisen, the CJEU chose to narrow the scope of the Judgment from one concerning the arbitration clause in any intra-EU BIT to one concerning the arbitration clause in an intra-EU BIT "such as" [Article 8 of the Netherlands-Slovak Republic BIT](#), which includes a choice of EU law clause. The Claimants differentiate the [Austria-Croatia BIT](#):

*The Netherlands-Slovak Republic BIT affirmatively mandated the application of the EU Treaties and EU law to investor-State disputes. The Austria-Croatia BIT, in contrast, contains no such provision. Instead, the parties have chosen the specialized regime of the BIT itself and other rules of international law to govern their investment disputes. At most, EU law will have to be considered as a factual predicate, which according to the CJEU itself does not create any incompatibility.*<sup>109</sup>

164. Therefore, argue the Claimants, the *Achmea* Judgment should be applied only to other arbitration clauses that have the same characteristics as [Article 8 of the Netherlands-Slovakia BIT](#), most

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<sup>104</sup> Respondent's Reply, para 72.

<sup>105</sup> Respondent's Memorial, para 78.

<sup>106</sup> Claimants' Counter-Memorial, para 161; Claimants' Post-Hearing Brief, paras 65, 100, 109-110.

<sup>107</sup> Claimants' Counter-Memorial, para 162, citing *Achmea* Judgment (RLM-31) (emphasis added by the Claimants).

<sup>108</sup> Claimants' Rejoinder, paras 119-124; Claimants' Post-Hearing Brief, paras 101-105.

<sup>109</sup> Claimants' Post-Hearing Brief, paras 9, 95.

importantly an express EU choice of law provision.<sup>110</sup> The Claimants emphasize that the [Austria-Croatia BIT](#) does not contain such an applicable law provision:

*Instead, the [Austria-Croatia BIT](#) prescribes a special body of international law rules applicable to investment disputes, and limits the Tribunal's jurisdiction under Article 9 of the [BIT] to the resolution of those disputes pursuant to the terms of the Treaty. The [Austria-Croatia BIT](#) therefore neither requires, nor indeed permits, application of national law to resolve investment disputes; rather, such disputes are to be resolved exclusively by reference to the [Austria-Croatia BIT](#)'s international standards regarding expropriation, fair and equitable treatment and discrimination.<sup>111</sup>*

165. The Claimants see no relevance to [Article 42 of the ICSID Convention](#), which is a default choice of law rule triggered if the parties have not chosen the law applicable to their dispute. Here, say the Claimants, the Parties have made that choice by virtue of the BIT's self-contained international regime, which has no choice-of-law provision like [Article 8\(6\) of the Netherlands-Slovak Republic BIT](#). Although RBI and RBHR admit that investor-state tribunals may need to consider the content of national or EU law as a matter of fact, this is not the same as applying EU law as the governing law of the dispute.<sup>112</sup>

166. The Claimants urge the Tribunal to consider the reasoning of the *Eskosol v. Italy* tribunal, which, as described by Raiffeisen, accepted that applying EU law "as an accessory relevant not in its own right but only as a predicate question, analogous to a factual finding, for the application of international law standards" is consistent with Article 344 of the TFEU.<sup>113</sup> The *Eskosol* tribunal referred to the Opinion of the Council Legal Services in the CJEU case *Commission v. Ireland* :

*[I]t is not sufficient, in order to establish a breach of Article 344 TFEU, that an arbitration tribunal takes account of EU law as a criterion for interpreting a provision not forming part of EU law. There could be an infringement of Article 344 TFEU only if the subject-matter of the decision of the arbitration tribunal were the interpretation and application of provisions of EU law themselves.<sup>114</sup>*

167. At the end of the day, say the Claimants, they make their claims under the international standards of protection in the [Austria-Croatia BIT](#), and not under EU law:

*Although the Tribunal may need to consider the Croatian courts' deficiencies in applying Croatian consumer protection law, which incorporates EU law in certain respects, to decide the Claimants' fair and equitable treatment claim, any such consideration of EU law would be as a matter of fact.<sup>115</sup>*

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<sup>110</sup> Claimants' Rejoinder, para 123.

<sup>111</sup> Claimants' Post-Hearing Brief, para 124.

<sup>112</sup> Claimants' Rejoinder, paras 149-156; Claimants' Post-Hearing Brief, para 142.

<sup>113</sup> Claimants' Post-Hearing Brief, paras 142, 162, citing *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Italy's Request for Immediate Termination and Italy's Jurisdictional Objection Based on Inapplicability of the Energy Charter Treaty to Intra-EU Disputes, 7 May 2019 (*Eskosol v. Italy*) (CLM-192), para 123.

<sup>114</sup> Claimants' Rejoinder, para 131 and Claimants' Post-Hearing Brief, para 162, citing *Eskosol v. Italy* (CLM-192), para 123 (emphasis in original).

168. The Respondent strongly disagrees with Raiffeisen's arguments on several fronts. First, as conceded by Raiffeisen's legal expert Sir Francis at the Hearing, the CJEU often uses the phrase "such as" in the *dispositifs* of its judgments.<sup>116</sup> Second, the CJEU expressly set out specific criteria of what is precluded in its *dispositif* in the *Achmea* Judgment:

*Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the [Netherlands-Slovak Republic BIT], under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept*<sup>117</sup>.

Accordingly, says Croatia, it would be "entirely illogical" to assume that the CJEU meant to include by implication all the characteristics of [Article 8 of the Netherlands-Slovak Republic BIT](#), including irrelevant criteria such as the number of arbitrators, and the Claimants "have failed to give any remotely plausible reason why the CJEU, having explicitly included multiple essential characteristics of general application" in the *dispositif*, should be understood to have done so.<sup>118</sup>

169. Thus, says Croatia, the only logical reading is that the CJEU referred to [Article 8 of the Netherlands-Slovak Republic BIT](#) in the *dispositif* as merely an example of a provision possessing the relevant treaty characteristics.<sup>119</sup> As a matter of grammar, the use of commas to demarcate the relative clause "such as Article 8 of the [Netherlands-Slovak Republic BIT]" further shows the scope of the CJEU's ruling in *Achmea*; the clause does not a limit or narrow that scope.<sup>120</sup>
170. Third, as for the choice of law clause in the [Netherlands-Slovak Republic BIT](#) in *Achmea*, Croatia posits that the relevant question is not "whether a specific tribunal must *in concreto* interpret or apply EU law in the particular dispute before it," but rather whether the underlying arbitration clause is compatible with the EU *acquis* whether, *in abstracto*, there is a possibility that a tribunal established under that same BIT "may" be allowed, or required, to interpret or apply points of EU law. If so, then the arbitration clause in that BIT is incompatible with the EU *acquis*, in particular with – at the very least – Articles 276 and 344 of the TFEU and with the principles of the autonomy of the EU legal order and mutual trust.<sup>121</sup>
171. Fourth, in any event, the Respondent argues that [Article 42 of the ICSID Convention](#) operates to include EU law as the applicable law of ICSID disputes, thereby making this arbitration similar to the *Achmea* Arbitration, in which [Article 8\(6\) of the Netherlands-Slovak Republic BIT](#) stipulated application of the state party's domestic law and EU law.
172. Finally, even if the words "such as" were to be interpreted as limiting application of the *Achmea* Judgment only to intra-EU BITs with the same characteristics as the BIT before the CJEU, Croatia

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<sup>115</sup> Claimants' Rejoinder, para 157.

<sup>116</sup> Respondent's Post-Hearing Brief, para 101, citing Tr. Day 2, 484:12-16 (Sir Francis).

<sup>117</sup> Respondent's Memorial, citing *Achmea* Judgment (RLM-31), page 11 (emphasis added by the Respondent).

<sup>118</sup> Respondent's Post-Hearing Brief, paras 102-103.

<sup>119</sup> Respondent's Post-Hearing Brief, para 104.

<sup>120</sup> Respondent's Post-Hearing Brief, para 104. See also Respondent's Reply, paras 99-100.

<sup>121</sup> Respondent's Post-Hearing Brief, para 79.

argues that [Article 9 of the Austria-Croatia BIT](#) "mirrors exactly" the language in [Article 8\(6\) of the Netherlands-Slovak Republic BIT](#).<sup>122</sup>

173. Turning to ICSID arbitration in particular, RBI and RBHR argue that the ICSID system is more akin to the investor-state dispute settlement mechanism in the Comprehensive Economic and Trade Agreement (the *CETA*), a mechanism which the CJEU (following the Opinion of Advocate General Bot<sup>123</sup>) distinguished from that involved in the *Achmea* Arbitration and held to be compatible with EU law in Opinion 1/17 (the *CETA Opinion*).<sup>124</sup> According to Raiffeisen, as with the CETA mechanism, this Tribunal is to "assess the content of EU law only insofar as necessary to determine a question of international investment law – but not for the purposes of determining or regulating EU law as such."<sup>125</sup> Further, "like the CETA investment court, this Tribunal will only assess EU law, like a fact, in order to determine if a substantive standard under the BIT or customary international law was breached."<sup>126</sup>
174. RBI and RBHR go on to describe allegedly material differences between ICSID arbitration and the bilateral *ad hoc* UNCITRAL arbitration in the *Achmea* Arbitration, which, as recognized by the *OperaFund v. Spain* tribunal, militate against applying the *Achmea* Judgment to ICSID arbitration.<sup>127</sup> According to Raiffeisen, when a state participates in ICSID arbitration proceedings pursuant to a BIT, the state is complying with its obligations under both the BIT and the ICSID Convention. Failure to comply would undermine the ICSID Convention by allowing state parties effectively to withdraw their irrevocable consent to arbitration under Article 25 "in the absence of an authoritative determination under general international law of the BIT's status."<sup>128</sup> The Claimants urge the Tribunal not to presume that the CJEU intended in its *Achmea* Judgment to place EU Member States in violation of their obligations under the ICSID Convention and international law, especially as the EU Treaties themselves: (a) require the EU to contribute to the strict observance and development of international law, and (b) stipulate that rights and obligations arising under treaties with third states are not to be affected by provisions of the EU Treaties.<sup>129</sup> The Claimants conclude that the *Achmea* Judgment cannot be read to extend to ICSID arbitrations.
175. The Respondent takes a different view. In response to the Claimants' CETA argument, Croatia argues that the CETA Opinion is inapposite because it interprets an agreement between the EU itself and non-EU Member States. Moreover, "CETA expressly precludes challenges to general legislation enacted for the purpose of social and consumer protection – the very claims brought in *Addiko* and in the present case."<sup>130</sup>

176.

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<sup>122</sup> Respondent's Post-Hearing Brief, paras 106-107.

<sup>123</sup> Opinion of Advocate General Bot dated 29 January 2019, ECLI:EU:C:2019:72 (FJ-35).

<sup>124</sup> Opinion 1/17 of the Court dated 30 April 2019, ECLI:EU:C:2019:341 (the CETA Opinion) (FJ-36); Jacobs Opinion, paras 32-37; Claimants' Rejoinder, para 133; Claimants' Post-Hearing Brief, paras 97, 158-160, 168.

<sup>125</sup> Claimants' Rejoinder, para 130

<sup>126</sup> Claimants' Post-Hearing Brief, para 160.

<sup>127</sup> Claimants' Rejoinder, para 134, citing *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain*, ICSID Case No. ARB/15/36, Award, 6 September 2019 (CLM-233), paras 383-387.

<sup>128</sup> Claimants' Rejoinder, paras 135-136.

<sup>129</sup> Claimants' Counter-Memorial, paras 168-174; Claimants' Rejoinder, paras 134-140; Claimants' Post-Hearing Brief, paras 117-122.

<sup>130</sup> Respondent's Observations on *Addiko* and *UniCredit*, para 17.

The Respondent charges the Claimants with seeking "to create a false equivalence between tribunals under this BIT and the CETA Tribunal in an attempt to establish that the CJEU retreated from its position in the *Achmea* Judgment ...."<sup>131</sup> Croatia argues that Raiffeisen cannot credibly group together ICSID tribunals and the CETA Tribunal and then distinguish them from the *Achmea* tribunal on grounds that they merely "assess the content of EU law" only as a matter of fact:

*The untenable nature of the Claimants' position is demonstrated once more by its internal contradictions. It is impossible for any tribunal established under Article 9 of the BIT to "assess the content of EU law" as a mere fact while being free to disregard CJEU case law, an essential part of EU law, at any rate without giving rise to precisely the risk of a failure to apply or misapplication of EU law which is incompatible with the EU acquis.*<sup>132</sup>

177. Going beyond Raiffeisen's CETA argument, Croatia pursues a different line of argument to show that the reasoning in the *Achmea* Judgment applies beyond intra-EU UNCITRAL arbitrations to intra-EU ICSID arbitrations. Croatia states that the CJEU's primary concern was the effect of intra-EU investment arbitration on the autonomy of the EU legal order and on the mutual trust and cooperation among Member States, which are protected by the referral mechanism that allows EU national courts to refer questions of EU law to the CJEU

for binding determination. The ICSID system, which, unlike the UNCITRAL regime, is subject to no supervision by national courts at all, risks splintering EU law by allowing tribunals to apply their own interpretations of EU law without any potential reference to the CJEU, thus threatening the autonomy of the EU legal order.<sup>133</sup> As for mutual trust and sincere cooperation, the CJEU found in the *Achmea* Judgment that this requires trust between Member States in their respective national legal systems, as well as ensuring that the CJEU referral mechanism is not jeopardized by carve-outs of certain dispute categories from the national courts and thus from the CJEU. Intra-EU ICSID arbitration is such a carve-out, and hence violates the EU principles of mutual trust and sincere cooperation.<sup>134</sup>

178. The Respondent contends that even Advocate General Wathelet, on whose Opinion the Claimants rely, rejected the use of ICSID arbitration clauses in intra-EU BITs as incompatible with the EU Treaties.<sup>135</sup> Croatia states that the *Achmea* Wathelet Opinion, in paragraphs 252-253, "contrasts UNCITRAL arbitration with ICSID arbitration and rejects the latter as incompatible since it lacks any possibility of review by the national courts of the EU Member States."<sup>136</sup>
179. The Claimants reject this contention, charging Croatia with quoting misleadingly from the *Achmea* Wathelet Opinion. The words attributed to the Advocate General actually were from a section in his Opinion in which he was setting out the EC's position. According to RBI and RBHR, paragraphs 252-253 of the Opinion are inconclusive because Advocate General Wathelet did not specifically

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<sup>131</sup> Respondent's Post-Hearing Brief, para 139.

<sup>132</sup> Respondent's Post-Hearing Brief, para 141.

<sup>133</sup> Respondent's Reply, paras 101-102.

<sup>134</sup> Respondent's Reply, paras 103-105.

<sup>135</sup> Respondent's Post-Hearing Brief, para 126.

<sup>136</sup> Respondent's Reply, paras 175, citing *Achmea* Wathelet Opinion (CLM-177), paras 252-253.

address ICSID arbitration, and his Opinion is supportive overall of all forms of investor-state arbitration.<sup>137</sup>

### *c. The Temporal Application of the Achmea Judgment*

180. The Parties disagree on whether the *Achmea* Judgment applies retroactively and even on whether the concept of retroactivity applies.

181.

The Respondent bases its position on the allegedly settled law that CJEU interpretations of the EU *acquis* have an *ab initio* effect, clarifying and defining where necessary "the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its coming into force" and consequently affecting even legal relationships that arose before the specific judgment ruling on the request for interpretation.<sup>138</sup> According to Croatia, rather than raising a question of retroactive application, this means that [Article 9 of the Austria-Croatia BIT](#) has been incompatible with the EU *acquis* since the date of Croatia's accession to the EU on 1 July 2013. This is especially so, because the "*ab initio* or *ex tunc* effect of the CJEU's interpretation is itself a principle of the EU *acquis* and thus equally integrated into the BIT through [Article 11\(2\) of the BIT](#)." <sup>139</sup>

182. In essence, Croatia argues that the *Achmea* Judgment did not change the EU *acquis* to render it incompatible with intra-EU BITs retroactively; the *Achmea* Judgment merely clarified and confirmed the effect of Articles 267 and 344 of the TFEU,<sup>140</sup> thereby providing the Tribunal with the benefit of "an authentic interpretation of the TFEU in the specific context of intra-EU BITs."<sup>141</sup> In other words, the EU *acquis* has always been incompatible with intra-EU BITs, and

*the legal basis for this latter incompatibility is not the Achmea Judgment as such but Articles 267 and 344 of the TFEU. The Achmea Judgment, like any exercise in statutory interpretation, merely clarified the already existing obligations under these provisions in the specific context of intra-EU investment treaties.*<sup>142</sup>

183. Croatia explains that the CJEU exceptionally may expressly limit the *ex tunc* effects of its preliminary rulings on past transactions in the interests of legal certainty. However, such limitations "will *always* be laid down *in the ruling itself*,"<sup>143</sup> and the CJEU included no such limitation in the *Achmea* Judgment.<sup>144</sup>

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<sup>137</sup> Claimants' Rejoinder, paras 141-144.

<sup>138</sup> Respondent's Memorial, paras 87-88, citing *Amministrazione delle Finanze dello Stato v. Denkavit Italiana S.r.l.*, CJEU Case 61/79, Judgment, 27 March 1980 (CLM-132), para 16 and *Ángel Barreira Pérez v. Instituto Nacional de la Seguridad Social (INSS) and Tesorería General de la Seguridad Social (TGSS)*, CJEU Case C-347/00, Judgment, 3 October 2002 (RLM-84), para 44. See also Craig Opinion, paras 62-63.

<sup>139</sup> Respondent's Reply, para 88.

<sup>140</sup> Respondent's Reply, para 50.

<sup>141</sup> Respondent's Reply, para 55.

<sup>142</sup> Respondent's Reply, para 60.

<sup>143</sup> Respondent's Reply, para 90, citing A. Dashwood et al., *Wyatt and Dashwood's European Union Law* (6th ed., 2011) (excerpts) (RLM-117), page 229 (emphasis added by the Respondent).

184. The Claimants' position is that, even accepting an *ex tunc* principle in EU law, the principle should not apply to the *Achmea* Judgment. As explained by the Claimants' legal expert Sir Francis, the CJEU typically limits the *ex tunc* effect of its rulings to extend the protection afforded by the EU Treaties to individuals against Member States, and so it would make little sense not to limit the *ex tunc* effect of the *Achmea* Judgment, which does not protect individuals but instead deprives individual investors of the protections afforded by BITs.<sup>145</sup> Further, the *ex tunc* effect of CJEU judgments must be balanced against other principles of EU law, including the principles of legal certainty, proportionality and the protection of fundamental rights. Sir Francis describes *Achmea* as a case where "the general principles of EU law ... would be furthered by limiting the temporal effects of the judgment, rather than applying it *ex tunc*."<sup>146</sup>

185. In this context, the Claimants acknowledge that the investor in the *Achmea* Arbitration did not comply with the EU First Occasion Rule, which requires a party to request non-retroactivity of a judgment the first time the CJEU considers the relevant issue. This is not surprising, say the Claimants, because First Occasion Rule requests are typically made by EU Member States to limit the economic impact of CJEU judgments by barring historical claims. In comparison, a private party such as the *Achmea* investor would not anticipate, post-judgment, being made a defendant in similar claims.<sup>147</sup> Given this different situation, application of the First Occasion Rule would not further the principle of legal certainty.<sup>148</sup>

186. Despite the *ex tunc* nomenclature, the Claimants contend that Croatia is effectively arguing—without convincing support—for retroactive application of the *Achmea* Judgment in violation of international law principles, in particular the critical date doctrine. According to Raiffeisen:

*It is an elementary principle of international adjudication that jurisdiction is determined by reference to the law in force at the date on which proceedings are instituted – the "critical date" – and that, once established, it is unaffected by subsequent events.*<sup>149</sup>

187. The Claimants contend that the critical date doctrine must trump any applicable *ex tunc* effect for the *Achmea* Judgment under EU or international law.<sup>150</sup> In support, they cite the *UniCredit* Decision:

*Even if there is ex tunc application of an EU judgment by virtue of a subsequent interpretation, that application is by virtue of a subsequent event – the time of the EU judgment.*<sup>151</sup>

188. The Claimants present two policy reasons underlying the critical date rule. First, it would be

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<sup>144</sup> Respondent's Reply, para 91.

<sup>145</sup> Claimants' Counter-Memorial, paras 189-190, citing Jacobs Opinion, paras 57-60; Claimants' Rejoinder, para 167, citing Jacobs Opinion, para 65 and Second Jacobs Opinion, paras 8, 11.

<sup>146</sup> Claimants' Counter-Memorial, paras 193-194, citing, inter alia, Jacobs Opinion, para 61.

<sup>147</sup> Claimants' Counter-Memorial, para 191.

<sup>148</sup> Claimants' Counter-Memorial, para 193.

<sup>149</sup> Claimants' Counter-Memorial, para 177.

<sup>150</sup> Claimants' Counter-Memorial, para 184.

<sup>151</sup> Claimants' Counter-Memorial, para 187, citing UniCredit Decision (CLM-210), para 123.

unacceptable for jurisdiction to cease to exist as the result of a subsequent event, because this would cause an unwarranted difference in the treatment of applications depending on the speed with which courts are able to examine the cases brought before them. Second, a respondent could deliberately place itself beyond a court's jurisdiction by bringing about an event resulting in non-fulfilment of jurisdictional requirements, for example, by denouncing a treaty.<sup>152</sup>

189. In the instant case, the Claimants identify the critical date for jurisdiction to be 15 September 2017, when the ICSID Secretary-General registered Raiffeisen's Request for Arbitration. Croatia's consent to arbitration under [Article 9 of the Austria-Croatia BIT](#) was perfected on that date. As the CJEU did not issue the *Achmea* Judgment until 6 March 2018, that Judgment had no effect on the Tribunal's jurisdiction.<sup>153</sup>
190. The Respondent accuses the Claimants of misrepresenting the critical date doctrine. Croatia asserts that "the relevant test for the purposes of the critical date doctrine is whether the post-critical date acts by a party to the dispute are the 'normal continuation of prior acts' and are not undertaken to improve a party's position in an ongoing dispute," and denies that it took any unilateral acts contrived to defeat the Tribunal's jurisdiction.<sup>154</sup> Indeed, says Croatia, it obviously could not have manipulated the CJEU, an independent judicial body that does not take instructions from the EU, let alone one EU Member State, into deciding the *Achmea* case in its favor.<sup>155</sup>
191. The Claimants respond that the critical date doctrine is not limited to unilateral acts by a respondent, citing the ICJ decisions in the *Arrest Warrant* and *Lockerbie* cases.<sup>156</sup> They also disagree with Croatia's assertion that the Singapore Court of Appeal, in the case of *Sanum Investments v. Laos*, recognized a spectrum of interpretations of the critical date doctrine.<sup>157</sup> The Claimants describe that decision as adopting the same understanding of the critical date doctrine that they advocate here: evidence post-dating the institution of proceedings is incapable of affecting a court or tribunal's jurisdiction, as determined at the date on which proceedings are instituted.<sup>158</sup>
192. Croatia objects further to the Claimants' interpretation of the critical date doctrine on grounds that "[t]he Claimants can no more ask the Tribunal to disregard the *Achmea* Judgment merely because it postdates the commencement of this case any more than the Respondent can ask the Tribunal to ignore the *UniCredit* Decision merely because it was rendered last year."<sup>159</sup> In response, RBI and RBHR clarify that they "rely on decisions subsequent to the *Achmea* judgment, including the

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<sup>152</sup> Claimants' Counter-Memorial, para 178, citing Application of the Convention for the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections, Judgment, 18 November 2008, [2008] ICJ 412 (CLM-136), para 80. See also Claimants' Post-Hearing Brief, para 248.

<sup>153</sup> Claimants' Counter-Memorial, para 181.

<sup>154</sup> Respondent's Reply, paras 137-138, citing Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, 17 December 2002, [2002] ICJ 625 (RLM-121), para 135.

<sup>155</sup> Respondent's Reply, paras 149-151.

<sup>156</sup> Claimants' Rejoinder, para 195, citing Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, 14 February 2002, [2002] ICJ 3 (Arrest Warrant) (CLM-183), paras 23-24, 26; Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States; Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgments, 27 February 1998, [1998] ICJ 9 and 115 (Lockerbie) (CLM-204 and CLM-205), paras 37-38.

<sup>157</sup> Claimants' Rejoinder, para 197, citing Sanum Investments Limited v. Government of the Lao People's Democratic Republic, [2016] SGCA 57, Judgment, 29 September 2016 (Sanum Investments v. Laos) (CLM-208).

<sup>158</sup> Claimants' Rejoinder, para 194-197

<sup>159</sup> Respondent's Reply, para 144.

decision in *UniCredit*, not as 'subsequent events' capable of affecting jurisdiction but as authorities on the effects, or absence thereof, of the subsequent event itself, i.e., the CJEU's judgment in *Achmea*."<sup>160</sup>

193. Separately, the Claimants charge the Respondent with seeking a retroactive invalidation of its irrevocable consent to arbitrate. In response, Croatia reiterates its argument that no "irrevocable" arbitration agreement between Croatia and Raiffeisen could have come into existence.<sup>161</sup> Rather, upon Croatia's accession to the EU on 1 July 2013, [Article 11\(2\) of the Austria-Croatia BIT](#) (by then, between two EU Member States) took effect to limit Croatia's consent to arbitrate to the extent of incompatibility with the EU *acquis*, specifically the substantive treatment standards and the Article 9 arbitration clause.<sup>162</sup> According to Croatia, Article 11(2)

*has always made it expressly clear that the BIT did not bind the Contracting Parties to anything contained therein ... to the extent that it was incompatible with the EU acquis in force at any given time. Since the BIT is incompatible with the EU acquis, which has been in force between the Contracting Parties to the BIT from the moment when Croatia joined the EU on 1 July 2013, both the investor-State arbitration clause and the substantive treatment provisions of the BIT have since this date been incompatible with the EU acquis.*<sup>163</sup>

194. To the extent the Claimants rely on the fact that the *Achmea* Judgment followed registration of the Request for Arbitration with ICSID on 15 September 2017, Croatia notes that the *Achmea* case was pending with the CJEU before the registration date.<sup>164</sup> The Claimants consider that fact of little significance, because "if *Achmea* were to have any import, the only legally relevant point in time is when the Court rendered judgment in that case."<sup>165</sup>

## (2) Incompatibility with Articles 276 and 344 of the TFEU

195. Croatia's position is that "the BIT has been incompatible with the EU *acquis* since 1 July 2013, the date when the EU *acquis* entered into force for the Respondent and the BIT became an intra-EU BIT."<sup>166</sup> The incompatibility is that, as decided in the *Achmea* Judgment, Articles 267 and 344 of the TFEU, respectively, preclude EU Member States from contracting out of the CJEU preliminary reference procedure and the exclusive CJEU competence within the EU legal order, as Austria and Croatia have done in the BIT.<sup>167</sup> With its *Achmea* Judgment in March 2018, says Croatia, the CJEU "divined, clarified and confirmed the law as it stood at the critical date."<sup>168</sup>
196. The Claimants deny that the EU *acquis* —as in force in 2017—recognized any incompatibility

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<sup>160</sup> Claimants' Rejoinder, para 170.

<sup>161</sup> Respondent's Reply, paras 59, 83-87.

<sup>162</sup> Respondent's Reply, paras 59-60; Respondent's Post-Hearing Brief, para 63.

<sup>163</sup> Respondent's Reply, para 47.

<sup>164</sup> Respondent's Reply, para 53.

<sup>165</sup> Claimants' Rejoinder, para 168.

<sup>166</sup> Respondent's Post-Hearing Brief, para 30.

<sup>167</sup> Respondent's Post-Hearing Brief, paras 59-60.

<sup>168</sup> Respondent's Post-Hearing Brief, para 56.

between intra-EU BITs and EU law. They rely on the *Bundesgerichtshof's* 2016 *Achmea* preliminary reference to the CJEU and the *Achmea* Wathelet Opinion, both of which considered intra-EU BITs to be compatible with EU law.<sup>169</sup> In response to criticism from Croatia, RBI and RBHR clarify that their argument is not that the *Achmea* Wathelet Opinion was itself part of the *acquis* at the critical date, but that it is "a persuasive and well-reasoned analysis of the *acquis* as it stood on 15 September 2017."<sup>170</sup>

197. The Parties offer different views as to whether Austria and Croatia considered the BIT to be incompatible with the EU *acquis* when Croatia acceded to the EU in 2013. Croatia, for its part, relies on a *note verbale* sent to Austria in 2011, in anticipation of accession, in which Croatia expressly raised the issue of denouncing the BIT as part of its obligation to bring its treaties into full alignment with the EU *acquis*.<sup>171</sup>
198. For the Claimants, however, the exchange of *notes verbales* shows merely that Croatia requested Austria's views on termination of the BIT and Austria did not agree to termination.<sup>172</sup> Furthermore, other treaties signed in the run-up to Croatia's accession and, most importantly, the accession treaty itself, indicated no concerns regarding the compatibility of Croatia's intra-EU BITs with EU law. The 2011 EU-Croatia Treaty of Accession obliged Croatia to "withdraw from any free trade agreements with third countries, including the Central European Free Trade Agreement as amended," but did not impose any similar obligations regarding intra-EU BITs.<sup>173</sup> The Claimants emphasize that the 2005 Stabilisation and Association Agreement between the European Communities and their Member States, on the one part, and the Republic of Croatia, on the other part (the *Association Agreement*), which was concluded as part of Croatia's early candidacy for EU membership, affirmatively encouraged Croatia to enter into BITs with EU Member States as a means of establishing a favorable climate for private investment.<sup>174</sup> This demonstrates, says Raiffeisen, that the parties to the Association Agreement did not consider intra-EU BITs to be incompatible with the *acquis*, but rather "an element that would help prepare Croatia for its accession to the EU."<sup>175</sup> Finally, RBI and RBHR note that both Croatia and Austria continue to affirm that the BIT remains in force.<sup>176</sup>
199. The Respondent rejects Raiffeisen's reliance on the Association Agreement on grounds that Article 85 of the Agreement does not address potential compatibility of intra-EU BITs with the EU *acquis*. Instead, says Croatia, the EU's encouragement to Croatia to enter into investment treaties with EU Member States "in no way implies that such investment treaties would remain compatible with the

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<sup>169</sup> Claimants' Rejoinder, para 169.

<sup>170</sup> Claimants' Post-Hearing Brief, para 59.

<sup>171</sup> Respondent's Reply, paras 162-164, citing Note Verbale of the Ministry for Foreign Affairs and European Integration of the Republic of Croatia to the Embassy of the Republic of Austria in Zagreb, No. 1594/11, dated 28 March 2011 (R-26). See also Respondent's Post-Hearing Brief, paras 120-121.

<sup>172</sup> Claimants' Rejoinder, paras 62-65, citing, inter alia, Record of consultations held with Austrian representatives on 13 September 2011 in the Ministry of Economy, Labour and Entrepreneurship (R-27). See also Claimants' Post-Hearing Brief, paras 51-52.

<sup>173</sup> Claimants' Rejoinder, paras 59-61, citing, inter alia, Act Concerning the Conditions of Accession, appended to the Treaty of Accession (OJ L 112, 24/04/2012) (RLM-32), Article 6(9).

<sup>174</sup> Claimants' Post-Hearing Brief, paras 45-47, citing Stabilisation and Association Agreement between the European Communities and their Member States, on the one part, and the Republic of Croatia, on the other part, concluded in Luxembourg on 29 October 2001, entered into force on 1 February 2005 (OJ L 26, 28/01/2002) (the Association Agreement) (CLM-218).

<sup>175</sup> Claimants' Post-Hearing Brief, para 47.

<sup>176</sup> Claimants' Counter-Memorial, para 27; Claimants' Rejoinder on Jurisdiction, para 61.

EU *acquis* once they had become intra-EU BITs."<sup>177</sup> Croatia highlights the concession of Raiffeisen's legal expert Sir Francis that there were "no precise assurances" of compatibility and that Article 85 of the Association Agreement only "comes very close to an assurance."<sup>178</sup>

200.

The Claimants put particular emphasis on a 14 February 2018 meeting, called by Croatia in connection with [Article 11\(3\) of the BIT](#), which calls for a dialogue to discuss "uncertainties concerning the effects of [[Article 11\(2\)](#)]." The Minutes of that meeting record what the Claimants describe as Austria's unequivocal views on the compatibility – before the *Achmea* Judgment – of the BIT and EU law:

*Austria reiterate[s] its previously expressed position that it considers BITs valid and that it does not deem them incompatible with EU law. Austria follows this position diligently also in the infringement proceedings brought against it by the European Commission. Austria considers that BITs fulfil their function and give additional assurances to investors. Austria points out that even DG FISMA admits that BITs provide useful additional protection [for investors].*

*Austria interprets [Article 11\(2\)](#) of the Agreement in [a – sic] way that incompatibility with the EU law only affects such individual provisions. Still Austria contends incompatibility with the EU law should be determined by the CJEU, even in case of individual provisions. In any event, individual provisions' incompatibility should not result in the whole BIT invalidity. Further, incompatibility should have effect as of the time when it is established, that is without retroactive effect.*

*Austria considers that arbitral tribunals could lack competence should the CJEU decide that the dispute resolution provision is incompatible with the EU law. If so, Austria considers that such decision would not change the dispute resolution provision and would have no impact on the pending proceedings.*

...

*Austria and Croatia concluded this meeting by stating once the CJEU decides on the *Achmea* dispute further steps may be discussed.*<sup>179</sup>

### (3) The 15 January 2019 Declaration and the 29 May 2020 Termination Treaty

201. In their submissions before the Hearing and their Post-Hearing Briefs, the Parties addressed the import of the 15 January 2019 Declaration. They subsequently added observations on the related 29 May 2020 Termination Treaty (discussed below).

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<sup>177</sup> Respondent's Post-Hearing Brief, para 116.

<sup>178</sup> Respondent's Post-Hearing Brief, para 118, citing Tr. Day 2, 517:18–518:5 (Sir Francis).

<sup>179</sup> Claimants' Counter-Memorial, paras 203, 215 citing Minutes of the meeting with the Austrian representatives regarding the interpretation of Article 11 paragraph 2 and 3 of the Agreement on the promotion and protection of investment concluded with Austria (English translation from Croatian) (the February 2018 Minutes) (C-243).

## a. The 15 January 2019 Declaration

202.

The Respondent argues that the 15 January 2019 Declaration, signed by all 28 EU Member States, confirms that [Article 9 of the BIT](#) is incompatible with the EU *acquis*, on the basis of the text:

*[A]ll investor-State arbitration clauses contained in bilateral investment treaties concluded between Member States are contrary to Union law and thus inapplicable ... An arbitral tribunal established on the basis of investor-State arbitration clauses lacks jurisdiction, due to a lack of a valid offer to arbitrate by the Member State party to the underlying bilateral investment Treaty.*<sup>180</sup>

203.

Croatia then asserts that the Declaration is part of the EU *acquis* as one of the "declarations and resolutions adopted by the Union" and, by virtue of [Article 11\(2\) of the BIT](#), the Tribunal is bound to apply it.<sup>181</sup> Additionally, Croatia describes the 15 January 2019 Declaration as the result of a dialogue between Austria and Croatia as per [Article 11\(3\) of the BIT](#), which clarifies any uncertainty arising from the effects of Article 11(2) and should be respected by the Tribunal.<sup>182</sup> Croatia also argues that the Declaration constitutes a subsequent agreement between Austria and Croatia as to the authoritative and binding interpretation of both the TFEU and the BIT, as per [Article 31\(3\)\(a\) of the VCLT](#).

204.

Raiffeisen's first argument in response, as a procedural matter, is that the Tribunal should draw adverse inferences on the issue of the 15 January 2019 Declaration based on Croatia's refusal to comply with the Tribunal's order to produce the documents listed in its Privilege Log.<sup>183</sup> The Claimants contend that these documents, all of which appear to relate to the Declaration, could have been relevant to show differing positions among EU Member States on the issue of the incompatibility of intra-EU investment treaty arbitration with EU law. Or, say the Claimants, the documents could have evidenced EC pressure on the Member States to induce them to sign the Declaration, which would be relevant to rebut Croatia's claim that nothing prevented the EU Member States that originally argued for compatibility from refusing to sign the Declaration or qualifying their signatures.

205.

RBI and RBHR offer several responses to Croatia's substantive arguments on the import of the 15 January 2019 Declaration. First, they argue that—as found by the *Addiko* and *UniCredit* tribunals and agreed by the Respondent's legal expert, Professor Craig—the Declaration is not part of the EU *acquis*, because it was not adopted by the European Union itself and instead is described as "Declaration of the Representatives of the Governments of the Member States."<sup>184</sup>

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<sup>180</sup> Respondent's Memorial, paras 36-37, citing Declaration of the Representatives of the Governments of the Member States on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union (the 15 January 2019 Declaration) (RLM-60), page 1.

<sup>181</sup> Respondent's Memorial, paras 46-47.

<sup>182</sup> Respondent's Memorial, paras 49-50.

<sup>183</sup> Claimants' Rejoinder, paras 175-181; Claimants' Post-Hearing Brief, paras 263-267.

<sup>184</sup> Claimants' Post-Hearing Brief, para 261, citing Tr. Day 2, 417:21-418:7 (Craig); Claimants' Observations on *Addiko* and *UniCredit*, para 29; Craig Opinion, para 160(a).

206. Second, the Declaration cannot be deemed to be an authoritative interpretation of EU law, because only the CJEU is empowered to interpret the EU Treaties. In the opinion of Raiffeisen's legal expert, Sir Francis:

*Moreover, even if the Member States could be taken to represent the EU for these purposes, they would not have the power to issue any authoritative interpretation of the EU Treaties or to alter or extend the meaning of a judgment of the CJEU. The CJEU is the supreme authority within the EU with regard to the interpretation of the Treaties, and its interpretations are authoritative and binding on the Member States and the EU institutions.*<sup>185</sup>

207. Third, the Declaration cannot evidence an EU level dialogue between Austria and Croatia concerning interpretation of [Article 11\(2\) of the BIT](#) for purposes of [Article 11\(3\) of the BIT](#), as the Declaration makes no reference to the BIT.<sup>186</sup> In this connection, the Claimants emphasize that the EU has threatened infringement proceedings against any Member State unwilling to make a public commitment in favor of terminating intra-EU BITs by signing the Declaration, thereby bringing into question whether the Declaration can be considered the result of a "dialogue."<sup>187</sup> Finally, in similar vein, the Claimants argue that the Declaration is not relevant to a treaty interpretation exercise under [Article 31\(3\)\(a\) of the VCLT](#), given that it is not an agreement regarding interpretation of the [Austria-Croatia BIT](#) and the provisions of the BIT.<sup>188</sup>

208. The Claimants also charge Croatia with misapplying the Singapore Court of Appeal Judgment in *Sanum Investments v. Laos* in connection with its argument that the 15 January 2019 Declaration supports retroactive modification of the BIT.<sup>189</sup> In that case, the Singapore Court of Appeal refused to allow Laos to modify the geographical scope of the application of the Laos-China BIT retroactively by producing *notes verbales* with China that post-dated commencement of the arbitration.<sup>190</sup> In comparison—and, according to Raiffeisen, wrongly—Croatia characterizes the Declaration as a "normal continuation of diplomatic relations between the EU Member States" that was not undertaken to improve its position in the instant case and, indeed, Croatia could not have prevailed upon the other 27 Member State to sign the Declaration to improve its position in the instant case.<sup>191</sup>

## ***b. The 29 May 2020 Termination Treaty***

209. In its Observations on the Termination Treaty, the Respondent takes the position that, despite Austria's not being a signatory, the May 2020 Termination Treaty confirms the "consensus view of

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<sup>185</sup> Jacobs Opinion, para 75. See also Claimants' Rejoinder, para 183; Claimants' Post-Hearing Brief, para 269.

<sup>186</sup> Claimants' Rejoinder, para 186; Claimants' Post-Hearing Brief, paras 272-273.

<sup>187</sup> Claimants' Counter-Memorial, para 204.

<sup>188</sup> Claimants' Rejoinder, paras 184-185; Claimants' Post-Hearing Brief, para 271.

<sup>189</sup> Claimants' Post-Hearing Brief, para 276.

<sup>190</sup> Claimants' Rejoinder, para 189, citing *Sanum Investments v. Laos* (CLM-208), para 104.

<sup>191</sup> Respondent's Reply, para 138.

all EU Member States" that [Article 9\(2\) of the BIT](#) has been incompatible with the EU *acquis* since Croatia acceded to the EU on 1 July 2013.<sup>192</sup> Croatia contends that the Preamble of the Termination Treaty makes this "abundantly clear" in providing as follows:

*Investor-State arbitration clauses in bilateral investment treaties between the Member States of the European Union (intra-EU bilateral investment treaties) are contrary to the EU Treaties and, as a result of this incompatibility, cannot be applied after the date on which the last of the parties to an intra-EU bilateral investment treaty became a Member State of the European Union.*<sup>193</sup>

210. With the same concept incorporated in Article 4 of the Termination Treaty, Croatia contends that the Treaty "reflects the same consensus view of all EU Member States" as to incompatibility in the 15 January 2019 Declaration, which Austria signed.<sup>194</sup> Austria cannot resile from this earlier position, says Croatia, by refusing to sign the Termination Treaty. To meet Raiffeisen's objection on this point, Croatia offers clarification, for the avoidance of doubt, that it is not submitting that the Termination Treaty "creates direct legal effects for Austria as a non-party, in the sense of the Termination Treaty itself serving as the source of new obligations or rights for Austria."<sup>195</sup>
211. The Respondent relies on the alleged fact that, when declining to sign the Termination Treaty, Austria simultaneously affirmed its intention to implement the *Achmea* Judgment and terminate its intra-EU BITs.<sup>196</sup> In support of this allegation, Croatia refers to ongoing bilateral discussions with Austria reported in "diplomatic documents that the Respondent is constrained from disclosing as a matter of international law."<sup>197</sup>
212. In sharp contrast, in their Observations on the Termination Treaty, the Claimants note Austria's specific decision not to become a party and assert that the Termination Treaty "is therefore entirely irrelevant for the status of the [[Austria-Croatia BIT](#)] and immaterial to the Respondent's preliminary objections to jurisdiction."<sup>198</sup> In support of this position, RBI and RBHR rely on [Articles 34 and 35 of the VCLT](#), which reflect the "fundamental principle of international law" that a treaty does not create obligations for a third state without its consent and express acceptance of treaty obligations in writing.<sup>199</sup>
213. Even if the Termination Treaty did reflect a near-consensus view of the EU Member States, RBI and RBHR contend that the Treaty would still not form part of the EU *acquis*. This is because, without Austria, Ireland, Sweden and Finland as signatories, the Termination Treaty "is consequently not an international agreement 'concluded *by the Union*' or '*by the member states among themselves*' within the sphere of the Union's activities' so as to form part of the *acquis* within the EU's own definition of that term."<sup>200</sup>

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<sup>192</sup> Respondent's Observations on the Termination Treaty, paras 2, 11.

<sup>193</sup> Agreement for the Termination of Bilateral Investment Treaties between Member States of the European Union dated 29 May 2020 (the Termination Treaty) (RLM-173).

<sup>194</sup> Respondent's Observations on the Termination Treaty, para 7.

<sup>195</sup> Respondent's Observations on the Termination Treaty, para 10.

<sup>196</sup> Respondent's Observations on the Termination Treaty, para 16.

<sup>197</sup> Respondent's Observations on the Termination Treaty, para 17.

<sup>198</sup> Claimants' Observations on the Termination Treaty, para 3.

<sup>199</sup> Claimants' Observations on the Termination Treaty, para 5.

214. RBI and RBHR deny that Austria's signature of the 15 January 2019 Declaration has any relevance, because that signature "does not change the fact that Austria specifically chose not to become a party to the Termination Treaty, which is a separate legal instrument concluded well over a year later."<sup>201</sup>
215. Finally, the Claimants charge that Croatia's attempt to rely on asserted bilateral Croatia-Austria discussions "– while failing to substantiate their content or even their existence – is particularly disingenuous in light of its past refusal to produce documents related to 'discussions among EU Member States' on these issues in breach of the Tribunal's Procedural Order No. 6."<sup>202</sup> Even if there were such bilateral discussions, the Claimants contend that they would not circumvent the [VCLT Article 34](#) principle that treaties do not create obligations or rights for third states without their consent. Moreover, by operation of the critical date doctrine, even if Austria and Croatia were to agree to terminate the BIT and even to terminate the sunset provision in Article 12(3), such termination "would not, according to fundamental principles of international law and adjudication, in any way affect this Tribunal's jurisdiction or the Claimants' rights under the [BIT]."<sup>203</sup>

## B. THE TRIBUNAL'S ANALYSIS AND DECISION BY MAJORITY

216. This section contains the views of the majority of the Tribunal, formed by Arbitrators Reed and Alexandrov. Arbitrator Tomov's dissenting views appear in Section VII.C below.
217. Having carefully considered the Parties' extensive submissions, the Tribunal sets out in this section its analysis of whether the ICSID [arbitration clause in Article 9 of the Austria-Croatia BIT](#) is incompatible with the EU *acquis* in force on 15 September 2017. The Tribunal begins with the necessary temporal inquiry into the state of the EU *acquis* on that date and the central question of what role, if any, the *Achmea* Judgment plays.
218. This inquiry does not, in the Tribunal's view, require interpretation or application of the *acquis*. Instead, it requires the Tribunal to take account of the relevant *acquis*, as a necessary component of the comparative analysis mandated in [Article 11\(2\) of the BIT](#). The Tribunal likens its role, in this respect, to that of the anticipated CETA Tribunal, which was vetted as compliant with Article 344 of the TFEU in the CETA Opinion relied upon by Raiffeisen. In the words of that Opinion:

*[T]he CETA Tribunal, when it is called upon to examine the compliance with the CETA of the measure that is challenged by an investor and that has been adopted by the investment host State or by the Union, will inevitably have to undertake, on the basis of the information and arguments presented to it by that investor and by that State or by the Union, an examination of the effect of that measure. That examination may, on occasion, require that the domestic law of the respondent Party be taken into account. However, as is stated unequivocally in Article 8.31.2 of the CETA, that*

<sup>200</sup> Claimants' Observations on the Termination Treaty, para 10, citing EC, "European Neighbourhood Policy and Enlargement Negotiations: Glossary" (C-239) (emphasis added by the Claimants).

<sup>201</sup> Claimants' Observations on the Termination Treaty, para 11.

<sup>202</sup> Claimants' Observations on the Termination Treaty, para 13.

<sup>203</sup> Claimants' Observations on the Termination Treaty, para 17.

*examination cannot be classified as equivalent to an interpretation, by the CETA Tribunal, of that domestic law, but consists, on the contrary, of that domestic law being taken into account as a matter of fact, while that Tribunal is, in that regard, obliged to follow the prevailing interpretation given to that domestic law by the courts or authorities of that Party, and those courts and those authorities are not, it may be added, bound by the meaning given to their domestic law by that Tribunal.*<sup>204</sup>

219. The Tribunal wishes to underscore specifically its understanding of its role vis-à-vis the CJEU and the *Achmea* Judgment. There is no doubt, and the Parties do not dispute, that EU law creates a legal order with special characteristics. This is recognized in the *Achmea* Judgment itself:

*[T]he autonomy of EU law with respect both to the law of the Member States and to international law is justified by the essential characteristics of the EU and its law, relating in particular to the constitutional structure of the EU and the very nature of that law. EU law is characterised by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States, and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves.*<sup>205</sup>

220. The CJEU operates on the level of the EU legal order, and its judgments are binding within the bounds of that order. In contrast, international arbitration tribunals constituted under investment treaties operate on the level of the international legal order. Investor-state tribunals have confirmed this principle many times over, for example, in *Electrabel v. Hungary* and *RREEF v. Spain*.<sup>206</sup> This Tribunal operates on the plane of the international legal order, with authority from the instruments pursuant to which it was constituted, specifically the [Austria-Croatia BIT](#) and the ICSID Convention. In assessing questions of its jurisdiction, the Tribunal is bound to apply those instruments in accordance with international law.

221. The Tribunal will need to assess the effect of the CJEU's *Achmea* Judgment for the purpose of [Article 11\(2\) of the BIT](#). This does not mean, however, that the Tribunal must defer or should defer—or even responsibly could defer—to the *Achmea* Judgment as to the interpretation or application of the BIT. Just as this Tribunal is not empowered to issue authoritative interpretations of EU law, which properly lies within the legal prerogative of the CJEU, the CJEU is not empowered to issue authoritative interpretations of provisions in the [Austria-Croatia BIT](#), whether directly or indirectly.

## (1) The EU *Acquis* on 15 September 2017 and the Effect of the

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<sup>204</sup> CETA Opinion (FJ-36), para 131 (emphasis added).

<sup>205</sup> *Achmea* Judgment (RLM-31), para 33.

<sup>206</sup> *Electrabel S.A. v. Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015 (*Electrabel v. Hungary*) (CLM-68), para 4,112; *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016 (*RREEF v. Spain*) (CLM-157), para 75.

## Achmea Judgment

222. To set the stage, it is helpful to review the scope of the EU *acquis communautaire*. The Parties agree that the *acquis* includes, among other things: (a) the content, principles and political objectives of the TEU and TFEU; (b) legislation adopted by the EU in application of the EU Treaties; (c) the case law of the CJEU; (d) declarations and resolutions adopted by the EU; and (e) international agreements concluded by the EU that are binding on it and on its Member States.<sup>207</sup> The Parties also agree that opinions of the CJEU Advocates General are part of the *acquis*, unless and until they are rejected by the CJEU or otherwise found incompatible with primary elements of the *acquis* including the EU Treaties.<sup>208</sup>
223. The Parties further agree that the CJEU's *Achmea* Judgment has formed part of the EU *acquis* at least since 6 March 2018 when it was rendered. However, as summarized above, the Parties disagree with respect to the retroactive effect, as per the Claimants, or the *ex tunc* effect, as per the Respondent, of the *Achmea* Judgment before 6 March 2018.
224. In summary, RBI and RBHR rely on the critical date doctrine in international law to argue that the *Achmea* Judgment did not become part of the *acquis* until after the Parties' consent to arbitration was perfected by ICSID registration of their Request for Arbitration on 15 September 2017. Thereafter, that consent became irrevocable under the ICSID Convention and so the *Achmea* Judgment can have no effect on the Tribunal's jurisdiction.
225. In contrast, Croatia's position is that the CJEU in its judgments declares the content of EU law by way of authoritative interpretation as to how EU law was always meant to be understood, with *ex tunc* effect. To put the argument in two steps for this proceeding: first, the 6 March 2018 *Achmea* Judgment obviously was not part of the *acquis* as of 15 September 2017; but, second, the CJEU's interpretation has legal effect *ex tunc* as of 15 September 2017 and, as relevant to this case, back to July 2013 when Croatia acceded to the EU and the EU legal order.
226. The Tribunal finds dispositive the first step in Croatia's argument, namely the acknowledgement that the *Achmea* Judgment was not part of the *acquis* as of 15 September 2017. Put simply, the then-future *Achmea* Judgment could not have been in force within the meaning of [Article 11\(2\) of the BIT](#) as of 15 September 2017.
227. The Tribunal fully understands the second step in Croatia's argument—that Articles 267 and 344 of the TFEU were part of the *acquis* in force on 15 September 2017, as was the principle that CJEU interpretations of the EU Treaties have *ex tunc* effect, and so the CJEU's interpretation of Articles 267 and 344 in *Achmea* must be effective on that date. The Tribunal readily accepts that a CJEU interpretation of the EU Treaties forms part of the *acquis* once formally rendered, but that interpretation—even assuming that it has the *ex tunc* effect under EU law that Croatia ascribes to the *Achmea* Judgment—cannot be in force before it is rendered and comes into existence. An interpretation by the CJEU cannot be in force with binding effect on unknowing parties. Neither

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<sup>207</sup> EC, "European Neighbourhood Policy and Enlargement Negotiations: Glossary" (C-239); EUR-Lex, Glossary – Acquis (R-14), available at: <http://eur-lex.europa.eu/summary/glossary/acquis.html>.

<sup>208</sup> Claimants' Post-Hearing Brief, para 53; Second Craig Opinion, para 51.

states nor investors can fairly be expected to guess what definitive interpretations of EU law may come from the CJEU in the future.

228.

Here, it is important to recall that the Claimants commenced this arbitration on 15 September 2017 based on the express statement in [Article 9\(2\) of the BIT](#) that Croatia had "irrevocably consent[ed] in advance" to ICSID arbitration. At that point, even with the public debate that preceded the *Achmea* Judgment on 6 March 2018, no one could say which way that judgment would go. As discussed in detail below, the record reflects that, at that given time, neither Austria nor Croatia understood [Article 9 of the BIT](#) to be definitively incompatible with the *acquis*. Nor did Advocate General Wathelet. Nor did the EU institutions responsible for the 2005 Association Agreement and the 2013 Treaty of Accession. Accordingly, the Tribunal finds persuasive the analysis of the *Addiko* tribunal:

*[T]he BIT must be read as a whole, including not only its [Article 11\(2\)](#) reference to the *acquis* "in force at any given time" (which recognizes that the *acquis* evolves and that the state of the *acquis* at a particular critical date is important), but also its Article 9 commitment to the irrevocability of Austria and Croatia's advance offer of consent to arbitrate. Both of these provisions moreover must be read in light of the general principles of international law which are inherently part of the applicable law of the BIT. In these circumstances, the Tribunal is unable to accept that, whatever EU law may provide regarding the *ex tunc* or *ex nunc* effect of the *Achmea* Judgment, [Article 11\(2\)](#) of the BIT mandates that this judgment be applied to international effect contrary to the basic propositions of both Article 9 of the same BIT and the generally accepted principles [in [Articles 46 and 69](#) of the VCLT regarding good faith reliance on treaty validity prior to the invocation of invalidity, so long as the grounds for invalidity were not already manifest at the time of such reliance].<sup>209</sup>*

229.

Croatia may wish to avoid pleading "retroactive application" of the *Achmea* Judgment, but the Claimants are correct in stating that "Croatia effectively requests the Tribunal to apply the purported *acquis* as it stands now [post- *Achmea* Judgment], with the benefit of hindsight."<sup>210</sup> Irrespective of whether the *Achmea* Judgment has an *ex tunc* effect under EU law, Croatia's approach must be rejected based on the text of [Article 11\(2\) of the BIT](#), read together with Article 9(2) and as a matter of international law.

230.

In sum, the Tribunal finds that the *Achmea* Judgment, which post-dates the registration of the Claimants' Request for Arbitration, cannot factor into the analysis of incompatibility under [Article 11\(2\) of the BIT](#).

231. In light of this finding, the Tribunal need not address the Parties' arguments concerning the binding nature of the *Achmea* Judgment itself in this proceeding, whether the *Achmea* Judgment applies to ICSID arbitration, or whether the CJEU's determinations covering BIT provisions "such as" [Article 8\(6\) of the Netherlands-Slovak Republic BIT](#) apply to different choice of law provisions

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<sup>209</sup> Addiko Decision (CLM-250), para 279 (footnotes omitted). The Tribunal discusses Article 46 of the VCLT further in Section VII.B(3).

<sup>210</sup> Claimants' Post-Hearing Brief, para 11.

(or lack thereof).

## (2) Incompatibility with Articles 276 and 344 of the TFEU

232.

On Croatia's case, the *Achmea* Judgment *per se* is not necessary to prove that [Article 9 of the BIT](#) was already incompatible with Articles 276 and 344 of the TFEU upon Croatia's accession to the EU in 2013 and, therefore as at 15 September 2017, leaving Croatia unable validly to consent to ICSID (or UNCITRAL) arbitration with Raiffeisen. The Tribunal now turns to this question of inherent incompatibility under [Article 11\(2\) of the BIT](#).

233. As noted above, the Parties agree that the test for incompatibility is whether the obligations in the two treaties are such that compliance with one obligation would put a state in non-compliance with another. Applied in the present case, the question is whether Croatia, by consenting to ICSID arbitration of investment disputes with investors of Austria, was in non-compliance with Articles 276 and 344 of the EU *acquis* in force on 15 September 2017.

234. The Tribunal considers that the relevant state of the EU *acquis* in force on that date is clear from the record of this arbitration.

235. Most notably, in the long run-up to Croatia's accession to the EU, the 2005 Association Agreement unequivocally encouraged Croatia to expand its BITs with EU Member States. The text of Article 85 of that Agreement, entitled "Investment promotion and protection," merits quoting:

*1. Cooperation between the Parties shall be aimed at establishing a favourable climate for private investment, both domestic and foreign.*

*2. The particular aim of cooperation shall be:*

*— for Croatia to improve a legal framework which favours and protects investment;*

*— the conclusion, where appropriate, with Member States of bilateral agreements for the promotion and protection of investment ;*

*— the improvement of investment protection.*<sup>211</sup>

This encouragement necessarily covered the full scope of investment treaties, including international arbitration clauses as well as substantive protections.

236.

The Tribunal considers that this requirement, a treaty obligation imposed by the EU and its then-Member States on Croatia in 2005, carries substantial weight in applying [Article 11\(2\) of the BIT](#). The purpose of the Association Agreement was to provide a transition period, during which Croatia had to adopt and implement the EU *acquis*. The EU Member States, at that time, evidently

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<sup>211</sup> Association Agreement (CLM-218), Article 85 (emphasis added).

understood expansion of BITs with EU Member States to be part of Croatia's adoption and implementation of the *acquis*. The Tribunal cannot accept Croatia's argument that, in effect, Croatia should have understood that any BITs it entered into with EU Member States with the encouragement of the Association Agreement would immediately become incompatible with the *acquis* upon Croatia's successful accession in 2013. As Sir Francis testified at the Hearing, Article 85 "comes very close to an assurance" of compatibility.<sup>212</sup>

237. In addition, although the subsequent 2013 Treaty of Accession is silent on the point of intra-EU BITs, the Tribunal cannot agree with the Respondent that silence signifies an about-face on the compatibility of BITs and the *acquis* at the time. By definition, the EU had by 2013 accepted that Croatia had adopted and implemented the *acquis* (subject to negotiated grace periods in certain fields) and hence further encouragement to enter into BITs with EU Member States was no longer necessary. Furthermore, the Treaty of Accession expressly required Croatia to withdraw from certain treaties, but not from the BITs that would become intra-EU BITs on accession.

238. The Tribunal considers the conclusion to be inescapable that intra-EU BITs, including their arbitration provisions, were reasonably understood in (at least) September 2017 to be compatible with the *acquis*, as would be the 1999 Austria-Croatia BIT once Croatia acceded to the EU in 2013 and the BIT became an intra-EU BIT. With this background, the Tribunal cannot accept that Croatia was in breach of the EU *acquis* on 15 September 2017 as a consequence of the Claimants' accepting its standing consent to arbitrate in [Article 9 of the BIT](#). Thus, there was no incompatibility within the meaning of [Article 11\(2\)](#) on that date.

239. The record contains no support for a different conclusion. To the contrary, as late as February 2018, it was clear that Austria and Croatia did not agree that the BIT was incompatible with the *acquis* then in force. At a meeting on 14 February 2018 called by Croatia to discuss "multiple ambiguities" concerning [Article 11\(2\) of the Austria-Croatia BIT](#), Austria expressed the view that the BIT was compatible with the *acquis* as at the time.<sup>213</sup> As emphasized by Raiffeisen, the Meeting Minutes unambiguously record Austria's position that "it considers BITs valid and that it does not deem them incompatible with the EU law," and should the CJEU find intra-EU treaty arbitration incompatible with EU law, "such decision would not change the dispute resolution provision and would have no impact on the pending proceedings."<sup>214</sup>

240. The Tribunal finds it significant that Austria expressed these views with full knowledge that the CJEU judgment in *Achmea* —whichever way it might go on the compatibility question—was imminent. The Tribunal also finds it significant that the context for these views was a meeting called by Croatia expressly in connection with [Article 11\(3\) of the BIT](#). To recall, Article 11(3) provides:

*In case of uncertainties concerning the effects of paragraph 2 of this Article the Contracting Parties*

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<sup>212</sup> Tr. Day 2, 519:16-18 (Sir Francis).

<sup>213</sup> February 2018 Minutes (C-243).

<sup>214</sup> February 2018 Minutes (C-243).

*will enter a dialogue.*<sup>215</sup>

241. The Tribunal considers it apparent, from the Minutes of the 14 February 2018 bilateral meeting, that Austria perceived no "uncertainties" to be resolved, at least before the CJEU rendered the *Achmea* Judgment. Further, for Austria's part, if the CJEU were to find incompatibility in *Achmea*, that finding would apply only prospectively and not affect existing proceedings, such as this arbitration. Even assuming that Croatia's views—which are not recorded—were directly contrary, the Minutes do not reflect any agreement by the Croatian and Austrian representatives that arbitration under [Article 9 of the BIT](#) was incompatible with the EU *acquis* then in force, for purposes of triggering [Article 11\(2\) of the BIT](#).
242. Although the Minutes recorded that after the CJEU's *Achmea* decision "further steps may be discussed," the Tribunal finds no evidence in the record of such further bilateral discussions having taken place. Instead, there is strong evidence that Austria maintained its views and, although a signatory to the 15 January 2019 Declaration, ultimately declined in May 2020 to support the Termination Treaty and terminate the [Austria-Croatia BIT](#).
243. Another indicator of the *acquis* in force at the critical date of 15 September 2017 is the *Achmea* Wathelet Opinion itself, issued only four days later on 19 September 2017. The opinion of Advocate General Wathelet was that intra-EU BITs were compatible with EU law, as also suggested in the preliminary reference from the German *Bundesgerichtshof* to the CJEU that prompted the CJEU *Achmea* case. The Tribunal agrees with Raiffeisen that the Opinion is a persuasive analysis of the *acquis* as it stood in September 2017, although the CJEU in the *Achmea* Judgment in March 2018 made contrary rulings on compatibility that now form part of the *acquis*.
244. In sum, in applying [Article 11\(2\) of the Austria-Croatia BIT](#), the Tribunal finds that [Article 9 of the BIT](#) was not incompatible with TFEU Articles 276 and 344 of the EU *acquis* in force as at 15 September 2017, when ICSID registered the Claimants' Request for Arbitration. Absent such incompatibility, Croatia's standing consent to arbitrate in the 1999 BIT was valid and binding, and the Claimants' acceptance of that offer perfected the consent required by the ICSID Convention.

### (3) Article 46 of the VCLT

245. The Tribunal finds support for its conclusion in the principle set forth in [Article 46 of the VCLT](#), which provides:
- 1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law*

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<sup>215</sup> BIT (C-4), Article 11.

*of fundamental importance.*

*2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.*<sup>216</sup>

246. The general rule in [Article 46](#) applies to the issue of binding consent to arbitration under [Article 9 of the BIT](#). Insofar as Croatia argues that, due to inherent incompatibility with the *acquis* and operation of [Article 11\(2\)](#), it was never bound by Article 9, any such incompatibility certainly was not "manifest" or "objectively evident."
247. That any incompatibility between the *acquis* and arbitration clauses in intra-EU BITs was anything but "manifest" or "objectively evident" is apparent from the broader context and evolution of views on the issue. Prior to the *Achmea* Judgment, the compatibility question was the subject of considerable debate. The position of the EC itself evolved substantially. At the initial stages of EU enlargement in Central and Eastern Europe, the purported incompatibility between intra-EU treaty arbitration clauses and EU law was not raised and, instead, Croatia and other countries were led to expand their intra-EU BITs. Subsequently, the EC directed Member States to take steps to terminate intra-EU BITs on their own terms, without any suggestion that those treaties were subject to automatic cessation or termination. It was only later that the EC took the position that intra-EU BITs had already ceased to apply on grounds of incompatibility with EU law, a position to which Advocate General Wathelet did not ascribe.
248. Viewed in the round, the Tribunal considers that the evolution in the EC's position and the contrary *Achmea* Wathelet Opinion, as well as the views expressed by Austria on the eve of the CJEU's *Achmea* decision, are a perfect illustration that, up until the *Achmea* Judgment, the question of the compatibility of intra-EU treaty arbitration clauses with EU law was, at a minimum, an open, complex and disputed question on the plane of EU law. Accordingly, to recall the wording of [Article 46 of the VCLT](#), it could not have been "objectively evident to any State conducting itself in the matter in accordance with normal practice and good faith" that the CJEU would ultimately come down on the side of incompatibility.

#### **(4) The 15 January 2019 Declaration and the 29 May 2020 Termination Treaty**

249. One issue remaining is the import of the subsequent events of the 15 January 2019 Declaration and the 29 May 2020 Termination Treaty.
250. In the 15 January 2019 Declaration, 22 EU Member States—including Austria and Croatia—joined the statement that

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<sup>216</sup> VCLT (CLM-129), Article 46.

*all investor-State arbitration clauses contained in bilateral investment treaties concluded between Member States are contrary to Union law and thus inapplicable ... An arbitral tribunal established on the basis of investor-State arbitration clauses lacks jurisdiction, due to a lack of a valid offer to arbitrate by the Member State party to the underlying bilateral investment Treaty.*<sup>217</sup>

251.

In light of its interpretation of [Article 11\(2\) of the BIT](#), the Declaration does not change the Tribunal's conclusion that it has jurisdiction under [Article 9](#). The Tribunal cannot accept the Respondent's panoply of arguments based on the Declaration. First, the Parties' legal experts agree that the Declaration, which was not adopted by the EU itself but by certain Member States, is not a part of the *acquis*.<sup>218</sup> The Tribunal notes the EC's definition of the *acquis* as including "declarations and resolutions adopted by the Union."<sup>219</sup> Second, even if it were, the Declaration was not part of the *acquis* in force in September 2017 when Croatia consented to arbitration, and so is irrelevant to demonstrate incompatibility for purposes of [Article 11\(2\) of the BIT](#). Third, insofar as Croatia describes the Declaration as an authoritative interpretation of Articles 267 and 334 of the TFEU with effect in September 2017, only the CJEU is empowered to issue such an interpretation and, in any event, the title itself identifies the Declaration as a statement on the "legal consequences" of the *Achmea* Judgment. Fourth, that Austria and Croatia signed the Declaration cannot transform the multilateral process leading to the Declaration into either, first, a bilateral dialogue under [Article 11\(3\)](#) of the BIT concerning "uncertainties concerning the effects of" [Article 11\(2\)](#) or, second, a "subsequent agreement between the parties regarding the interpretation of the [BIT] treaty or the application of its provisions" for purposes of [Article 31\(3\)\(a\) of the VCLT](#).

252. Nor does the 29 May 2020 Termination Treaty change the Tribunal's conclusion that it has jurisdiction. The Termination Treaty, at least when in force, certainly does form part of the EU *acquis*. The Tribunal recognizes the clarity of purpose in the Preamble: "Investor-State arbitration clauses in [intra-EU BITs] are contrary to the EU Treaties and, as a result of this incompatibility, cannot be applied after the date on which the last of the parties" became an EU Member State.

253. However, the Tribunal must also recognize that Austria, despite having signed the 15 January 2019 Declaration, is not a signatory to the Termination Treaty and the [Austria-Croatia BIT](#) is not included in the Annex of terminated intra-EU BITs. Even assuming the Termination Treaty has *ex tunc* effect in the EU legal order, the Tribunal agrees with Raiffeisen that—without Austria consenting to its terms—the Treaty is irrelevant to this dispute, as a matter of international law under [Articles 34 and 35 of the VCLT](#).<sup>220</sup>

254. Given the Tribunal's determination that neither the 15 January 2019 Declaration nor the Termination Treaty supports Croatia's Preliminary Objections, there is no need to rule on Raiffeisen's request that the Tribunal draw adverse inferences from Croatia's refusal to produce EC background documents in violation of Procedural Order No. 6.

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<sup>217</sup> 15 January 2019 Declaration (RLM-60), page 1.

<sup>218</sup> Jacobs Opinion, para 74; Tr. Day 2, 417:21–418:7 (Schwarz, Craig).

<sup>219</sup> EC, "European Neighbourhood Policy and Enlargement Negotiations: Glossary" (C-239).

<sup>220</sup> Claimants' Observations on the Termination Treaty, para 5.

## C. THE DISSENTING VIEW

255. Arbitrator Tomov does not agree with the conclusion of the majority of the Tribunal in Section VII.B above.
256. Arbitrator Tomov considers that, pursuant to [Article 11\(2\) of the Austria-Croatia BIT](#), Austria and Croatia have agreed that if the BIT or any part of it is incompatible with the EU *acquis* in force in any given time, they are not bound by it. The term EU *acquis* is shorthand for the EU legal system as a whole. Consequently, Austria and Croatia have agreed that incompatibility is to be determined not only by reference to the elements of the EU legal system taken separately and in isolation, but also by reference to its rules governing which court has the power to interpret authoritatively the meaning of these elements, and the temporal and personal scope of the court's decisions. In other words, in [Article 11\(2\) of the BIT](#), Austria and Croatia have agreed that the rules of the EU legal system will govern the temporal effect and the relevance of the CJEU's *Achmea* Judgment for assessing the content of the EU *acquis* in force on 15 September 2017, the moment in time when the Claimants filed their Request for Arbitration.
257. EU law, as developed in the record, does not support the exclusion of the *Achmea* Judgment. In addition, neither the critical date doctrine nor [Article 46 of the VCLT](#) mandates another interpretation of [Article 11\(2\) of the Austria-Croatia BIT](#) or negates in full or in part the clear agreement between Austria and Croatia expressed in Article 11(2) and/or the legal consequences under EU law. The first, according to the *Nottebohm* case, has a residual nature.<sup>221</sup> The second does not apply because, according to the ILC Fragmentation Report, in the case of incompatibility between treaties, the incompatible treaty is not invalid but simply inapplicable.<sup>222</sup>
258. Even if the *Achmea* Judgment were not considered a part of the EU *acquis* in force on 15 September 2017, the acts and documents on which the majority bases its decision—the position of the EU Commission in regard to intra-EU BITs over the years, the 2005 Association Agreement, the 2013 Treaty of Accession, and the *Achmea* Wathelet Opinion—do not support the conclusion that, at that moment in time, the arbitration clauses in intra-EU BITs were reasonably understood to be compatible with Article 267 and Article 344 of the TFEU. On the contrary, when the compatibility of [Article 9 of the Austria-Croatia BIT](#) with Article 267 and Article 344 of the TFEU is analyzed in the light of the previous decisions of the CJEU, on which the *Achmea* Judgment is based, the opposite conclusion is predictable and likely.

## VIII. WHETHER THE BIT IS INCOMPATIBLE WITH THE ANTI-DISCRIMINATION PROVISIONS OF THE EU ACQUIS

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<sup>221</sup> *Nottebohm Case (Lichtenstein v. Guatemala)*, Preliminary Objection, Judgment, 18 November 1953, [1953] ICJ 111 (*Nottebohm*) (CLM-202), pp 119, 121.

<sup>222</sup> ILC Fragmentation Report (RLM-100), paras 320, 333, 340.

## A. THE PARTIES' POSITIONS

### (1) Compatibility with the EU Treaties

259.

In addition to its main arguments of incompatibility between [Article 9 of the BIT](#) and Articles 276 and 344 of the TFEU, on grounds of precluding the CJEU's exclusive role in the EU legal order, the Respondent contends that Article 9 and the substantive protections in the BIT are also incompatible with the EU *acquis* key principles of mutual trust and non-discrimination.<sup>223</sup> The relevant *acquis* provisions, all indisputably in force as at 15 September 2017, are Articles 18, 49 and 63 of the TFEU. In brief, Article 18 of the TFEU prohibits "any discrimination on the grounds of nationality;" Article 49, "restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State;" and Article 63(1), "all restrictions on the movement of capital between Member States and between Member States and third countries."<sup>224</sup> Professor Craig describes these rules as "form[ing] the cornerstone of the single market, which is the economic core of the EU."<sup>225</sup>

260. It is Croatia's position that, by providing investors from Austria and Croatia with dispute resolution and substantive protections not available to nationals of other EU Member States, Article 9 and fair and equitable treatment (*FET*) and other substantive protections in the BIT have the effect of discriminating against nationals of other EU Member States on grounds of nationality, thus disturbing the level playing field in terms of freedom of establishment and movement of capital between EU Member States.<sup>226</sup> Such unequal treatment violates, and is not compatible with, the *acquis*.

261. In their primary argument in response, RBI and RBHR describe Croatia's arguments as mere assertions, offering little basis to distinguish the long line of treaty arbitration decisions finding BIT investor-state arbitration and substantive investment provisions to be compatible with EU law.<sup>227</sup> In support, the Claimants list some 30 decisions, starting with *Eastern Sugar v. Czech Republic* in March 2007 through *Watkins Holding v. Spain* in January 2020,<sup>228</sup> including the decisions of the *Addiko* and *UniCredit* tribunals.<sup>229</sup> Drawing on that line of cases, the Claimants insist that there is no incompatibility, because the [Austria-Croatia BIT](#) only requires that Croatia not treat investors from other EU Member States and third states **more** favorably than it treats Austrian investors; the BIT does not require Croatia to treat non-Austrian investors **less** favorably than Austrian investors.<sup>230</sup> In what the Claimants label a "complete response" to the Respondent's argument, they cite Sir Francis' first Opinion:

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<sup>223</sup> Respondent's Post-Hearing Brief, para 6.

<sup>224</sup> Respondent's Memorial, para 94, citing TFEU (RLM-30).

<sup>225</sup> Craig Opinion, para 9.

<sup>226</sup> Respondent's Memorial, paras 94-95, 100-102.

<sup>227</sup> Claimants' Counter-Memorial, paras 76-78, 100-105.

<sup>228</sup> Claimants' Post-Hearing Brief, para 77 note 93, citing, inter alia, *Eastern Sugar B.V. v. Czech Republic*, SCC Case No. 008/2004, Partial Award, 27 March 2007 (*Eastern Sugar v. Czech Republic*) (CLM-143), paras 142-181; *Watkins Holding S.à.r.l. and others v. Kingdom of Spain*, ICSID Case No. ARB/15/44, Award, 21 January 2020 (*Watkins Holding v. Spain*) (CLM-244), paras 180-226.

<sup>229</sup> Claimants' Observations on *Addiko* and *UniCredit*, para 30.

<sup>230</sup> Claimants' Counter-Memorial, para 80; Claimants' Post-Hearing Brief, para 79.

*In practice, the combined effect of the BIT and EU law is that Croatia is required to treat investors from all EU Member States as favourably as it treats investors from Austria – and therefore as favourably as it treats investors from any non-Member State. I can see nothing problematic about that. There would only be a conflict between the BIT and EU law if the BIT required Croatia to treat Austrian investors more favourably than investors from other Member States, but it does not do that.*<sup>231</sup>

262. The Respondent describes the Claimants' position as "fail[ing] on the ordinary meaning of discrimination," because "[e]xpressly granting an advantage only to one group amounts as much to discrimination as expressly depriving another group."<sup>232</sup>

263. RBI and RBHR retort that, even if this were so, the remedy for such discrimination would be for Croatia to extend the same treatment it provides to Austrian investors to investors from other EU Member States, citing *Eastern Sugar v. Czech Republic* among other decisions.<sup>233</sup> This remedy, according to Raiffeisen, is preferable to allowing Croatia to rely on its own alleged wrong and escape substantive liability under the [Austria-Croatia BIT](#).<sup>234</sup>

264. Croatia describes as "inconsequential" the fact that the BIT does not prohibit it from extending that advantage to nationals of other EU Member States "by means of hypothetical future treaties."<sup>235</sup> In Croatia's words:

*This does not detract from the indisputable fact that, in direct violation of the EU acquis, the BIT creates advantages (both procedural and in terms of substantive treatment standards) for investors of one other EU Member State that it does not extend to investors from other EU Member States. The Claimants' position merely means that extant discrimination could hypothetically be removed.*<sup>236</sup>

265. The Parties agree there is no direct relevance to the CJEU's *Achmea* Judgment on this issue, as the Judgment is silent as to discrimination. Croatia acknowledges that "there is no equally specific guidance on this point from the CJEU."<sup>237</sup>

266. The Claimants do rely on the *Achmea* Wathelet Opinion, which, in light of the silence on discrimination in the *Achmea* Judgment, they say still stands as part of the relevant *acquis*. Although Advocate General Wathelet addresses the investor-state arbitration provision in the [Netherlands-Slovak Republic BIT](#), the Claimants consider that his opinion is equally applicable to substantive protections in BITs.<sup>238</sup> That opinion is that BITs are not incompatible with EU law on

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<sup>231</sup> Claimants' Counter-Memorial, para 80, citing Jacobs Opinion, para 83 (emphasis in original).

<sup>232</sup> Respondent's Reply, para 181.

<sup>233</sup> Claimants' Rejoinder, para 41, citing, inter alia, *Eastern Sugar v. Czech Republic* (CLM-143), para 170.

<sup>234</sup> Claimants' Rejoinder, para 42.

<sup>235</sup> Respondent's Reply, para 182.

<sup>236</sup> Respondent's Reply, para 182.

<sup>237</sup> Respondent's Post-Hearing Brief, para 6.

the basis of discrimination:

*[T]he fact that the reciprocal rights and obligations created by the BIT apply only to investors from one of the two Contracting Member States is a consequence inherent in the bilateral nature of BITs. It follows that a non-Netherlands investor is not in the same situation as a Netherlands investor so far as an investment made in Slovakia is concerned.*

...

*[An investor-state dispute settlement] mechanism such as that established by [Article 8 of the BIT](#), which confers on Netherlands investors the right to have recourse to international arbitration against the Slovak Republic, does not constitute discrimination on the ground of nationality, prohibited by Article 18 TFEU.*<sup>239</sup>

267. As contended by the Claimants, treaties are not discriminatory under EU law simply because they afford certain treatment only on a bilateral basis. In support, RBI and RBHR cite the CJEU double taxation treaty case of *D. v. Inspecteur van de Belastingdienst* (the *DCase*), which was also cited in the *Achmea Wathelet* Opinion in the context of compatibility of arbitration provisions.<sup>240</sup>
268. Croatia argues in response that the *D Case* is not analogous, because EU Member States have specifically retained competence over direct taxation under Article 65(1)(a) of the TFEU and therefore have leeway to conclude bilateral double taxation treaties, whereas the EU regime has competence to govern intra-EU commerce and movement of capital.<sup>241</sup>
269. The Claimants do not accept this distinction. They highlight that the CJEU did not base its decision in the *D Case* on individual Member State competence in taxation,<sup>242</sup> and Advocate General Wathelet had already rejected a similar argument made by the EC.<sup>243</sup> RBI and RBHR further clarify that they
- never suggested that it was the mere bilateral character of tax treaties that rendered them analogous for present purposes to BITs. Rather, it is the fact that the nationals of the parties to the treaty are, by virtue of the treaty, in a different situation from other EU nationals.*<sup>244</sup>
270. Finally, as with arbitration provisions in BITs, RBI and RBHR observe that many investment treaty tribunals have found that the TFEU does not contain substantive equivalents of the FET and other substantive protections in the relevant applicable BIT, leading to decisions that the two treaties are not incompatible.<sup>245</sup>

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<sup>238</sup> Claimants' Rejoinder, para 34.

<sup>239</sup> *Achmea Wathelet* Opinion (CLM-177), paras 75, 82.

<sup>240</sup> Claimants' Counter-Memorial, paras 81-86; *Achmea Wathelet* Opinion (CLM-177), paras 73-75.

<sup>241</sup> Respondent's Reply, paras 186-188.

<sup>242</sup> Claimants' Rejoinder, para 37.

<sup>243</sup> Claimants' Rejoinder, para 39.

<sup>244</sup> Claimants' Rejoinder, para 40.

<sup>245</sup> Claimants' Counter-Memorial, para 87; Claimants' Rejoinder, para 41.

## (2) Compatibility with the GATS

271. The Respondent argues that the GATS is part of the EU *acquis*, as an international agreement concluded by the EU and entered into by the Member States among themselves within the sphere of the EU's activities.<sup>246</sup> Consequently, incompatibility with the GATS would also constitute incompatibility with the EU *acquis*.
272. The Claimants do not accept that the GATS is part of the EU *acquis*. In support, the Claimants cite CJEU decisions that consistently leave out the World Trade Organization (*WTO*) Agreements from the rules referred to when reviewing the legality of measures taken within the EU. The CJEU has explained that the WTO Agreements afford WTO Members significant flexibility in implementing WTO rules (for example, by allowing a Member to choose to pay compensation instead of withdrawing a WTO-inconsistent measure), a flexibility that the Claimants describe as allowing a Member to decide for itself whether even to comply with the rules or, put a different way, rendering the WTO rules "not binding enough."<sup>247</sup> *A fortiori*, say the Claimants, the GATS suffers from the same implications and, like other WTO Agreements, is not considered part of the EU *acquis*.<sup>248</sup>
273. The Respondent brushes aside Raiffeisen's argument, distinguishing the question of whether the CJEU deems the WTO Agreements to have direct effect such that they can be relied on by individuals in EU courts from the question of whether the BIT is incompatible with the EU *acquis*. Further, the CJEU has held that EU Member States that fail to adopt measures necessary to implement an international agreement concluded by the EU have breached their EU law obligations, which confirms that international agreements concluded by the EU, such as the GATS, are part of the EU *acquis*.<sup>249</sup>
274. The Claimants describe as inapposite the Respondent's argument that the question of the WTO Agreements not having direct effect as distinct from the question of whether the BIT is incompatible with the EU *acquis*. After all, in order to answer the question of compatibility with the EU *acquis*, one must first identify the content of that *acquis*.
275. Proceeding on the basis that the GATS is part of the EU *acquis*, Croatia alleges that the [Austria-Croatia BIT](#) is incompatible with the *acquis* because it is incompatible with Article II(1) of the GATS, an anti-discrimination clause, which provides:

*With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.*<sup>250</sup>

276. Croatia identifies three relevant requirements in Article II(1) of the GATS: (a) the measure at issue must be a "measure covered" by the GATS; (b) the relevant services or service suppliers must be

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<sup>246</sup> Respondent's Memorial, paras 103-104, 106.

<sup>247</sup> Claimants' Rejoinder, para 200. See also Claimants' Counter-Memorial, para 232.

<sup>248</sup> Claimants' Counter-Memorial, paras 226-233.

<sup>249</sup> Respondent's Reply, para 192.

<sup>250</sup> Respondent's Memorial, para 107, citing General Agreement on Trade and Services (the GATS) (RLM-33), Article II(1).

"like;" and (c) the WTO Member must accord "no less favourable treatment" to the service or service suppliers of another WTO Member.

277. Croatia next contends that the BIT meets all three requirements. As to the first, given the broad definition of "affecting trade and services" found in WTO Appellate Body cases, the BIT qualifies as a measure affecting trade in services covered by the GATS.<sup>251</sup> Second, as the purpose of the BIT to privilege investors supplying services with protections not available to third state investors that supply the same type of services, the requirement of "likeness" is met.<sup>252</sup> As to the third requirement, given that the substantive protections in the BIT are extended only to investors of Austria and Croatia, there necessarily is less favorable treatment of investors of other WTO Members.<sup>253</sup>
278. The Claimants disagree with the Respondent's arguments on the Article II(1) requirements. In particular, as to the third, RBI and RBHR reiterate that the BIT does not require Croatia to accord a certain level of treatment to investors not from Austria, and it would be fully consistent with the BIT for Croatia to accord fair and equitable treatment to investors from all other states or to treat investors from all other states no less favorably than it treats Croatian investors.<sup>254</sup>
279. In further support of its position, Croatia notes that seven WTO Members have taken the express step of exempting their BITs from the GATS most-favored-nation obligations, thus implying that investment treaties do fall within the scope of Article II. Austria and Croatia not having so exempted their BIT from Article II, the BIT must be incompatible with the GATS.<sup>255</sup>
280. Raiffeisen's response is that adopting this argument would have "seismic implications" for international trade and investment, given that most GATS Members, including the United States, Japan, China and the EU itself, have not scheduled exemptions for themselves, and that WTO Members have more than 3,000 BITs in place. In any case, the exemption situation actually undermines Croatia's argument, because the effect of the exemptions is simply to reserve the right to impose domestic measures implementing international investment agreements, and not the right to enter into the investment agreements themselves.<sup>256</sup>

## B. THE TRIBUNAL'S ANALYSIS AND DECISION

### (1) Compatibility with the EU Treaties

281. The Tribunal rejects the Respondent's arguments that Article 9 and the substantive protections in the BIT are incompatible with the anti-discrimination provisions in Articles 18, 49 and 63 of the TFEU, as part of the *acquis* in force as at 15 September 2017.

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<sup>251</sup> Respondent's Memorial, paras 110-112; Respondent's Reply, paras 195-196.

<sup>252</sup> Respondent's Memorial, para 113.

<sup>253</sup> Respondent's Memorial, para 114.

<sup>254</sup> Claimants' Counter-Memorial, paras 239-242.

<sup>255</sup> Respondent's Memorial, paras 115-118.

<sup>256</sup> Claimants' Counter-Memorial, paras 222-224.

282. The Tribunal finds it clear that [Article 9 of the BIT](#) operates to make ICSID or UNCITRAL arbitration available to qualified Croatian and Austrian investors, without affecting the dispute resolution avenues available—whether the same as, or different and perceived as more or less favorable than ICSID or UNCITRAL arbitration—to investors from other EU Member States.
283. The Tribunal finds it similarly clear that the substantive provisions of the BIT, including the FET protection provided in [Article 2\(1\)](#), do not require Croatia to treat Austrian investors more favorably than investors from other EU Member States. The Tribunal is persuaded by Sir Francis' opinion that "the combined effect of the BIT and EU law is that Croatia is required to treat investors from all EU Member States as favourably as it treats investors from Austria – and therefore as favourably as it treats investors from any non-Member State," which is not problematic.<sup>257</sup>
284. In coming to this conclusion on discrimination, the Tribunal aligns with the *Addiko* and *UniCredit* tribunals in noting the absence of any CJEU interpretation of the TFEU "as barring the procedural or substantive provisions of intra-EU BITS on discrimination grounds."<sup>258</sup> The CJEU in its *Achmea* Judgment did not touch on discrimination issues. It follows that, as argued by Raiffeisen, "the only standing interpretation on the issue in the EU *acquis*" is the *Achmea* Opinion of Advocate General Wathelet, who found the procedural and substantive provisions of intra-EU BITS compatible with the non-discrimination provisions in the TFEU.<sup>259</sup> Like the *Addiko* tribunal, this Tribunal must accept that the *Achmea* Wathelet Opinion concerning discrimination *still stands as part of the acquis, unless the Tribunal were prepared to declare that Opinion fundamentally wrong as a matter of EU law (i.e., as incorrectly interpreting the TFEU). But this would be fundamentally inconsistent with Croatia's argument that the Tribunal should not second-guess the prevailing interpretations of the acquis that were provided by the competent EU bodies.*<sup>260</sup>
285. Advocate General Wathelet in his *Achmea* Opinion rejected the charge that intra-EU BITS are incompatible with Articles 18, 267 and 344 of the TFEU because they provide preferential treatment to nationals of the contracting states and thereby discriminate against other EU nationals.<sup>261</sup> His opinion, writ large, was that the FET and other substantive protections in the Netherlands-Slovak Republic BIT—which are generally found in BITS— exceed the scope of protection in the TEU and TFEU.<sup>262</sup>

## (2) Compatibility with the GATS

286. The Respondent did not pursue its incompatibility arguments based on the GATS at the Hearing or in its Post-Hearing Brief. Based on the Parties' arguments, the Tribunal, like the tribunal in *Addiko*,

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<sup>257</sup> Jacobs Opinion, para 83.

<sup>258</sup> *Addiko* Decision (CLM-250), para 301; *UniCredit* Reconsideration Decision (CLM-251), para 234.

<sup>259</sup> Claimants' Observations on *Addiko* and *UniCredit*, paras 30-33, citing *Addiko* Decision (CLM-250), para 301 and *UniCredit* Reconsideration Decision (CLM-251), para 235.

<sup>260</sup> *Addiko* Decision (CLM-250), para 301.

<sup>261</sup> *Achmea* Wathelet Opinion (CLM-177), para 180.

<sup>262</sup> *Achmea* Wathelet Opinion (CLM-177), paras 179-228.

is not convinced that the GATS is part of the EU *acquis*.<sup>263</sup>

287.

Assuming for the sake of argument that the GATS is part of the *acquis* for purposes of [Article 11\(2\) of the BIT](#), the Tribunal agrees with the Claimants that the two treaties are not incompatible given that the BIT does not require Austria and Croatia to provide less favorable "investment incentives or restrictions" to other WTO members than they provide to each other. It is compelling that a contrary interpretation would leave all WTO Member States that are parties to BITs in violation of the GATS.

## IX. THE MONETARY GOLD PRINCIPLE

### A. THE PARTIES' POSITIONS

288. The Respondent makes the additional argument that, if the Tribunal were to find jurisdiction in this dispute, it would "condemn the Republic of Austria to incurring responsibility under the EU *acquis* as much as it would trigger responsibility for the Respondent" as the other Contracting State to the BIT, and thereby run afoul of the *Monetary Gold* principle.<sup>264</sup>

289. As summarized by Croatia, the *Monetary Gold* principle, as set out by the ICJ in the eponymous case, bars jurisdiction where the legal interests of a third state not before the Court would form the very subject matter of the Court's decision. The purpose is to prevent determination of the third state's legal obligations without that state's consent.<sup>265</sup>

290. The Claimants contend that the *Monetary Gold* principle is inapplicable for several reasons.

291. First, only Croatia has ever invoked the *Monetary Gold* principle in investor-state arbitration cases.<sup>266</sup> According to Raiffeisen, the fact that none of the other state respondents in the more than 24 cases challenging jurisdiction in intra-EU investment arbitrations has raised the principle "demonstrates that in reality the principle does not apply in these disputes."<sup>267</sup>

292. Second, RBI and RBHR argue that the *Monetary Gold* principle is not engaged just because a tribunal must address a question affecting the legal interests of the relevant third state. The ICJ has found that even the "simultaneous determination of responsibility" of a third state is insufficient to trigger the *Monetary Gold* principle. What instead is required, say the Claimants, is that the ICJ would have to rule "as a prerequisite" to its decision on the lawfulness of the third state's conduct without that state's consent to the Court's jurisdiction.<sup>268</sup> Given that Croatia's argument here is

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<sup>263</sup> Addiko Decision (CLM-250), para 305.

<sup>264</sup> Respondent's Memorial, paras 162.

<sup>265</sup> Respondent's Memorial, paras 160-162, citing, inter alia, *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom and United States of America)*, Judgment, 15 June 1954, ICJ Reports 19 (*Monetary Gold*) (RLM-108), para 45.

<sup>266</sup> Claimants' Counter-Memorial, paras 247-248.

<sup>267</sup> Claimants' Rejoinder, para 205.

<sup>268</sup> Claimants' Rejoinder, paras 207-215, citing *East Timor (Portugal v. Australia)*, Judgment, 30 June 1995, [1995] ICJ 90 (RLM-109), paras 28,

premised on the supposition that, if the Tribunal finds jurisdiction, it "would, at the same time, inevitably condemn Austria to incurring responsibility under the EU *acquis* as much as it would trigger responsibility for the Respondent," the present case would not trigger the *Monetary Gold* principle.<sup>269</sup>

293. Third, RBI and RBHR point out that the ICJ, in limiting the scope of the *Monetary Gold* principle, has underscored that its decisions are binding only on the parties before it, thus safeguarding the rights of third states. The same would hold true of any jurisdiction decision made by this Tribunal, which would have binding force only between Raiffeisen and Croatia, thereby not endangering Austria's international rights and obligations.<sup>270</sup>

## B. THE TRIBUNAL'S ANALYSIS AND DECISION

294. Having considered the Parties' positions, the Tribunal finds that the *Monetary Gold* principle is not engaged in this case.
295. As reflected in the reasoning above, there is no need for the Tribunal to rule on any aspect of Austria's conduct as a prerequisite to finding jurisdiction. A decision by the Tribunal that it has jurisdiction—or, for that matter, that it does not—may indirectly affect the legal interests of Austria (or its nationals) as well as those of Croatia, but no issue of Austrian state responsibility under the EU *acquis* or the BIT is involved. Croatia is the state whose legal responsibility is being invoked.
296. To echo the words of the Addiko tribunal, "Austria's procedural and substantive rights thus will remain entirely unaffected by this Decision and by whatever ruling the Tribunal eventually renders on other issues as between [the Claimants] and Croatia."<sup>271</sup>
297. In sum, the BIT remains fully in force and valid under the applicable international law of treaties. The Tribunal is validly seized with jurisdiction under the BIT and must proceed to decide the substantive disputes before it.

## X. COSTS

### A. THE PARTIES' POSITIONS

#### (1) The Respondent's Costs

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<sup>269</sup> Respondent's Reply, paras 241-242.

<sup>270</sup> Claimants' Rejoinder, para 216.

<sup>271</sup> Addiko Decision (CLM-250), para 307.

In its Statement of Costs, first submitted on 6 March 2010 and updated on 6 July 2020, the Respondent seeks an award of its full costs of arbitration in connection with its Preliminary Objections, including all legal fees, expenses and other costs in the combined amount of HRK 20,000.00, EUR 2,371,183.45 and GBP 17,435.60. These costs, which do not include Tribunal and ICSID fees, break down as follows:

Item	Amount (HRK)	Amount (EUR)	Amount (GBP)
Legal fees and expenses		2,358,215.09	
Fees and expenses of EU law expert			17,435.60
Fees and expenses of other experts (prior to suspension on the merits)		12,968.36	
Additional client costs	20,000		
Tribunal and ICSID fees			
<b>SUBTOTAL</b>	<b>20,000</b>	<b>2,371,183.45</b>	<b>17,435.60</b>

299. The Respondent determined not to maintain its objections that the Claimants were not qualified investors that had made qualified investments under the BIT. However, Croatia reserved its rights in relation to costs, on grounds that the Claimants had failed to provide the necessary evidence until their Counter-Memorial, despite having had two earlier opportunities to do so when filing their Memorial on the Merits and their Response to Croatia's Preliminary Objections to Jurisdiction and Request to Suspend the Proceedings on the Merits.<sup>272</sup>

## (2) The Claimants' Costs

300. In their Submission on Costs dated 6 March 2020, the Claimants seek their full costs of arbitration, including all legal fees, expenses and other costs incurred in connection with the Preliminary Objections. Based on tables of the total hours and fees for each attorney and law firm employee and other costs by category, the total amount in the Claimants' Submission on Costs is EUR 1,743,177.58,<sup>273</sup> broken down as follows:

Item	Amount (EUR)
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<sup>272</sup> Respondent's Reply, para 4.

<sup>273</sup> The Tribunal has identified an arithmetic error in the sum of the Claimants' claimed costs. The sum total is EUR 1,743,177.58 and not EUR 1,743,117.58 as stated in paragraphs 3 and 10 of the Claimants' Statement of Costs dated 6 March 2020.

Legal fees	1,248,086.70
Expert fees	142,670.31
ICSID registration fee and advance payments	273,000.00 (USD 300,000.00)
Travel	71,502.93
Document printing	4,002.51
Outside services	2,122.54
Research/publications	1,006.10
After-hours support	786.49
<b>TOTAL</b>	<b>1,743,177.58</b>

301. In their Supplemental Submission on Costs dated 6 July 2020, the Claimants seek an additional amount of EUR 8,518.00 in legal fees for preparation of the Observations on *Addiko* and *UniCredit*. This brings Raiffeisen's total costs claim to EUR 1,751,695.58, plus pre- and post-award interest at 2.54% (RBHR's opportunity cost of capital) compounded annually.
302. The Claimants submit that these total costs are reasonable and proportionate in light of the nature and complexity of the Preliminary Objections. The Claimants further note that they have entered into a success fee arrangement with WilmerHale providing for an uplift on the hourly rates paid, and reserve the right to claim reimbursement of their costs in line with this agreement at the end of this arbitration.

## B. THE TRIBUNAL'S ANALYSIS AND DECISION

303. The Tribunal has unanimously determined that the Respondent shall pay the Claimants their full costs of arbitration for this Preliminary Objections phase, on the ground that the Claimants have prevailed in full in their defenses to the Respondent's Preliminary Objections. The Claimants claim EUR 1,751,695.58 in costs. However, this sum includes the ICSID registration fee and the total amount of Claimants' advance payments to date, the latter of which is not fully expended. The Secretariat has advised the Tribunal that the expended amount of the Claimants' advance payments is 277,493.74 as of the date of this Decision. Thus, the Respondent shall pay the Claimants EUR 1,478,695.58 (amounting to the sum of Claimants' claimed costs, EUR 1,751,695.58, minus the ICSID registration fee and the total amount of the Claimants' advances to ICSID, EUR 273,000) and USD 277,493.74. If the Respondent does not pay the interim decision on costs to the Claimants within three months of the date of this Decision, the Tribunal will include interest on appropriate terms in the Award.

## XI. DECISION

304. For the foregoing reasons, the Tribunal:

(1) **Denies** by majority the Respondent's Preliminary Objections that the Tribunal lacks jurisdiction based on incompatibility of the [Austria-Croatia BIT](#) with the EU *acquis* ;

(2) **Decides** unanimously that the Respondent shall pay the Claimants their full arbitration costs of EUR 1,478,695.58 and USD 277,493.74 for this phase of the proceedings, subject to interest on appropriate terms should the Respondent not pay the interim decision on costs within three months of the date of this Decision; and

(3) **Directs** unanimously that this arbitration will now move forward for consideration