INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

UP and C.D Holding Internationale

v.

Hungary

(ICSID Case No. ARB/13/35)

AWARD

Members of the Tribunal
Professor Dr. Karl-Heinz Böckstiegel, President of the Tribunal
The Honourable L. Yves Fortier PC CC OQ QC, Arbitrator
Sir Daniel Bethlehem KCMG QC, Arbitrator

Secretary of the Tribunal
Mr. Francisco Abriani

Assistant of the Tribunal
Dr. Katherine Simpson

Date of dispatch to the Parties: 9 October 2018

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REPRESENTATION OF THE PARTIES

UP AND C.D HOLDING INTERNATIONALE:

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and
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and
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Hungary

FREQUENTLY USED ABBREVIATIONS AND ACRONYMS

Short Form	Long Title
§ / §§	paragraph / paragraphs; section / sections
AETR / EUFE	Association des Emetteurs de Titres de Restauration / Étkezési Utalávany Forgalmazól Egyesülés
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings of 10 April 2006
BIT	Bilateral Investment Treaty
C-#	Claimants' Exhibit
C-I	Claimants' Memorial on the Merits (19 January 2015)
C-II	Claimants' Reply on the Merits (11 April 2016)
CEX-#	Claimants' Expert Report
CJEU	Court of Justice of the European Union
CLA-#	Claimants' Legal Exhibit
CPHB-I	Claimants' Post-Hearing Brief (22 September 2017)
CWS-#	Claimants' Witness Statement
EC	European Commission
EU	European Union
ICSID	The International Centre for the Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States (18 March 1965)
KIM	Ministry of Public Administration and Justice
MNUA	Hungarian National Recreation Fund (*Magyar Nemzeti Üdülési Alapitvany*)
PIT	Personal Income Tax
PIT Law	Hungarian Act CXVII of 1995 on Personal Income Tax
PO-#	Procedural Order No. #
POS	Point of Sale
PSZAF	Hungarian Financial Supervisory Authority
R-#	Respondent's Exhibit
R-I	Respondent's Counter Memorial (17 July 2015)
R-II	Hungary's Rejoinder (21 July 2016)
REX-#	Respondent's Expert Report
RfA	Claimants' Request for Arbitration (3 December 2013)
RLA-#	Respondent's Legal Exhibit
RPHB-I	Respondent's Post-Hearing Brief (22 September 2017)
RWS-#	Respondent's Witness Statement
SZÉP Card	Szechenyi Recreational Card
UNCLOS	United National Convention on the Law of the Sea (10 December 1982)
TEC	Treaty on the Establishing the European Community
TEEC	Treaty Establishing the European Economic Community
TFEU	Treaty on the Functioning of the European Union

VCLT	Vienna Convention on the Law of Treaties (23 May 1969)
Výroba	Le Chèque Déjeuner Výroba – Výroba, s.r.o.
WACC	Weighted Average of the Cost of Equity and the Cost of Debt

DRAMATIS PERSONAE

Name	Position
Mr. Gordon Bajnai	Leader of Socialist Government (2008)
Dr. Ádám Balog	Deputy Under-Secretary of Economic Development
Mr. László Balogh	Vice President, the PSZAF
Commissioner Michael Barnier	EC Commissioner
Mr. Bálint Bessenyey	Sodexo representative
Ms. Anne Boddaert	Claimants' representative
Mr. Anthony Charlton	FTI Expert (First FTI Report, CEX-1)
Mr. Benedek Dér	Managing Director of Le Chèque Déjeuner Deutschland GmbH (author of CWS-1) Commercial and Sales Director of CD Hungary, 2002 – 2012
Mr. Pierre Gagnoud	Edenred representative
Dr. Zoltán Guller	President of the Board of Trustees of MNUA (author of RWS-1, RWS-3) Became the KIM Commissioner responsible for Erzsébet programme on 31 August 2012
Mr. Endre Horváth	Deputy Minister of State (economic development) (Hungary)
Mr. Zoltán Horváth	Deputy President of the Hungarian Competition Authority
Mr. Brent C. Kaczmarek, CFA	Navient Expert (REX-1 and REX-2)
Mr. Jacques Landriot	CEO of LCD (2012, 2013) President of CD Internationale
Mr. Yvon Legrand	Director of International Development for LCD Group Managing Director of CD Internationale Manager of CD Hungary (author of CWS-3)
Dr. Gal András Levente (Mr. András Levente Gál) Dr. Levente Gál András	Commissioner with the KIM (responsible for Erzsébet vouchers) (former administrative state secretary at the KIM and Ministerial Commissioner in charge of implementation of the Erzsébet Program in 2012)
Mr. Dávid Marton	Official from the KIM
Ms. Márta Nagy	Managing Director of Le Chèque Déjeuner Pologne (2013 – present) Administrative and Financial Director of CD Hungary (1997 – 1998) Managing Director of CD Hungary 1998 – 2012 (author of CWS-2 and CWS-4)
Ms. Róza Nagy	Under Secretary of Administration, Ministry of National Economy

Mr. Tibor Navracsics	Vice-Prime Minister and Minister of State Administration and Justice, Hungarian Ministry of State Administration and Justice
Mr. James Nicholson	FTI Expert (Second FTI Report, CEX-2)
Prime Minister Viktor Orbán	Prime Minister (Hungary)
Dr. Bence Rétvári	Secretary of State of the KIM
Mr. René Roudaut	French Ambassador to Hungary
President Nicholas Sarkozy	President of France
Mr. Kiran P. Sequeira, MBA, PE	Navigant Expert (REX-1 and REX-2)
Mr. Miklós Soltész	Secretary of State for the Ministry of Natural Resources (Hungary)
Mr. Kristóf Szatmáry	Ministerial Commissioner in the Prime Minister's Office for the Governmental Coordination of Commerce Policy (current title) Secretary of State for the Domestic Economy at the Ministry of National Economy (2011 – 2014) (author of RWS-2) Member of Hungarian Parliament (2006 – present) President of Budapest Chamber of Commerce (2008 – present)
Dr. László Trócsányi	Head of Ministry of Justice
Mr. Mihály Varga	Minister of the National Economy (Hungary)
Mr. Iván Vetési	Centra Office for Administration and Electronic Public Services

I. INTRODUCTION

A. THE DISPUTE

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("ICSID" or the "Centre") pursuant to the bilateral investment treaty between France and Hungary (the "BIT"), which entered into force on 30 September 1987, 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"). Claimants also rely on the bilateral investment treaty between Hungary and Croatia, which entered into force on 1 March 2002, and the bilateral investment treaty between Hungary and Lithuania, which entered into force on 20 May 2003.[1]

2. Claimants in these proceedings are UP, formerly known as Le Chèque Déjeuner ("LCD"), a cooperative company (*société cooperative de production à forme anonyme et capital variable*) incorporated under the laws of France, and C.D Holding Internationale ("CD Internationale"), a simplified joint stock company (*société par actions simplifiée*) wholly owned by UP and organized under the laws of France (collectively the "Claimants").[2]

3. Respondent is Hungary (the "Respondent"), a sovereign state.

4. The Parties' dispute concerns Respondent's 2011 reforms of its tax and other laws ("2011 Reform") and Claimants' unwillingness or inability to continue business in Respondent State as a result. Claimants allege that the 2011 Reform was in violation of the BIT. Respondent argues that Claimants' claims are unfounded on the merits.

B. THE TRIBUNAL'S TERMINOLOGY AND REASONING

5. The Tribunal has carefully examined all the arguments and evidence presented by the Parties throughout these proceedings. The Tribunal does not consider it necessary to reiterate in this Award all such arguments or evidence, which are well-known to the Parties. Further, insofar as

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1 In their Post-Hearing Brief filed after the Hearing on Jurisdiction, however, Claimants assert that they rely solely on the Hungary-Lithuania BIT. *See* Claimants' Post-Hearing Brief on Jurisdiction, § 7.

2 C-I §§ 9 – 12; Kbis excerpt (certificate of incorporation), LCD (16 October 2013); Kbis excerpt (certificate of incorporation), LCD (13 January 2015) **[C-0002]**; Constitutive instrument, CD Hungary (13 November 1996) **[C-0003]**; Kbis excerpt (certificate of incorporation), CD Internationale (12 September 2013) ; Kbis excerpt (certificate of incorporation), CD Internationale (13 January 2015) **[C-0004]**.

any matter has not been specifically identified or recorded in the body of this Award, this does not mean that it has not been taken into full consideration. The Tribunal discusses only those submissions which it considers most relevant for its decisions. The Tribunal's reasons, without repeating all the arguments advanced by the Parties, address what the Tribunal considers to be the determinative factors required to decide on the Requests of the Parties.

6. The Tribunal's use of one Party's terminology is without prejudice and in no way reflects the Tribunal's understanding of a particular issue. Rather, effort has been made to use consistent terminology throughout this Award to facilitate understanding. Likewise, the order in which the references are presented is not a reflection of a particular source's value in the eyes of the Tribunal. Instead, effort has been made to format the footnotes consistently.

II. THE ARBITRAL TRIBUNAL

7. On 26 February 2014, Claimants proposed the appointment of The Honourable L. Yves Fortier, PC CC OQ QC (Canadian) as arbitrator. He accepted the appointment on 6 March 2014. His contact details are as follows:

Mr. L. Yves Fortier PC CC OQ QC
Cabinet Yves Fortier
1 Place Ville Marie – Suite 2822
Montréal (Québec) H3B 1R4
Canada
Tel.: +1 514 286 2013
Fax: +1 514 286 2019
Email: yves.fortier@yfortier.ca

8. On 28 March 2014, Respondent proposed the appointment of Sir Daniel Bethlehem, KCMG QC (British) as arbitrator. ICSID notified the Parties of his acceptance of this appointment on 1 April 2014. Sir Daniel's details are as follows:

Sir Daniel Bethlehem QC
20 Essex Street
London WC2R 3AL, UK
Tel.: +44 20 7842 1200
Fax: +44 20 7842 1268
Email: DBethlehem@20essexst.com

9. On 25 June 2014, the Parties informed ICSID of their agreement to appoint Prof. Dr. Karl-Heinz Böckstiegel (German) as the President of the Tribunal. On 30 June 2014, ICSID informed the Parties that all three arbitrators had accepted their appointments. Prof. Böckstiegel's contact details are as follows:

Prof. Dr. Karl-Heinz Böckstiegel
Parkstr. 38
D-51427 Bergisch Gladbach, Germany
Tel.: +49 (0)2204 66268
Fax: +49 (0)2204 21812
Email: kh@khboeckstiegel.com

III. PROCEDURAL HISTORY

10. The Procedural History contained in the Tribunal's Decision on Preliminary Issues of Jurisdiction of 3 March 2016 is incorporated herein. For ease of reference, however, some major procedural events are noted, below.

11. On 3 December 2013, ICSID received a request for arbitration of the same date from LCD and CD Internationale against Hungary ("RfA"). ICSID registered the RfA in accordance with Art. 36(3) of the ICSID Convention on 23 December 2013.

12. The first session of the Tribunal with representatives of the Parties was held on 12 September 2014. The Parties confirmed that the Tribunal was properly constituted and that they had no objection to the appointment of any member of the Tribunal.

13. On 8 October 2014, the Tribunal issued **Procedural Order No. 1 ("PO-1")**.

14. On 19 January 2015, Claimants filed a Memorial on the Merits ("C-I") and accompanying documents.

15. On 17 July 2015, Respondent filed a Counter-Memorial on the Merits and Objections to Jurisdiction ("R-I") and requested bifurcation of the proceedings.

16. On 23 October 2015, Claimants filed a Reply on Objections to Jurisdiction and Response to Request for Bifurcation.

17. On 12 November 2015, the Tribunal issued **Procedural Order No. 2 ("PO-2")**, by which it decided that the proceedings would be bifurcated and the Tribunal's jurisdiction would be determined as a preliminary issue.

18. On 13 and 14 January 2016, the Tribunal held a hearing on jurisdiction with the Parties at the International Dispute Resolution Centre in London, United Kingdom.

19. On 19 January 2016, the Tribunal issued **Procedural Order No. 3 ("PO-3")**, requesting that the Parties submit their corrections to the hearing transcript by 22 January 2016 and submit their post-

hearing briefs by 5 February 2016.

20. On 22 January 2016, the Tribunal issued **Procedural Order No. 4 ("PO-4")**, containing the Tribunal's decisions on the Parties' document production requests and ordering the Parties to produce the relevant documents by 12 February 2016.

21. On 3 March 2016, the Tribunal issued its **Decision on Preliminary Issues of Jurisdiction**. Claimants consented to the publication of the decision by email on 9 March 2016 but, on 11 March 2016, Respondent refused consent to publish the decision.

22. On 1 April 2016, the Tribunal accepted the Parties' revised timetable, based on PO-1 Annex A.

23. On 7 April 2016, the Tribunal requested the Parties' permission to appoint Dr. Katherine Simpson as Assistant to the Tribunal, pursuant to Section 3.6 of PO-1. The Tribunal submitted Dr. Simpson's CV and Declaration to the Parties for their review and comment.

24. On 11 April 2016, Claimants submitted their Reply on the Merits ("C-II"), together with supporting documentation, to the Tribunal.

25. On 18 April 2016, ICSID informed the Parties that Dr. Simpson's appointment was effective.

26. On 21 July 2016, Respondent submitted "Hungary's Rejoinder" ("R-II"), together with supporting documentation, to the Tribunal.

27. On 29 July 2016, Respondent wrote to the Tribunal in response to C-II and to Claimants' claims concerning the adequacy of Respondent's document production in connection with Claimants' Requests No. 5-7. Respondent stated that it undertook a "*reasonable search*" and was unable to locate any documents responsive to the requests, as modified. Respondent argued that Claimants' request for the Tribunal to draw an adverse presumption was not justified.

28. On 4 August 2016, Claimants submitted "Claimants' Second Request for the Production of Documents" to the Tribunal.

29. On 5 August 2016, the Tribunal responded to Respondent's 29 July 2016 letter stating that it did not see any need for action.

30. On 8 August 2016, Respondent wrote in opposition to Claimants' document request.

31. On 11 August 2016, the Tribunal wrote in reference to the Parties' communications regarding document requests. The Tribunal clarified that, with its letter of 5 August 2016, it had neither

accepted nor rejected Respondent's explanations regarding Requests No. 5-7. The Tribunal indicated that it would address Claimants' submission of 4 August 2016 and Respondent's letters of 29 July and 8 August 2016 in its 22 September 2016 decision on the Parties' second requests for production of documents, as planned in PO-1.

32. On 1 September 2016, Claimants sent their revised "Second Request for the Production of Documents" to the Tribunal.

33. On 29 September 2016, the Tribunal issued **Procedural Order No. 5 Regarding the Parties' Second Requests for Document Production ("PO-5")**.

34. On 5 October 2016, the Tribunal sent its draft of **Procedural Order No. 6 Regarding the Hearing on the Merits ("PO-6")** to the Parties, for their review and comment by 12 October 2016. On 12 and 13 October 2016, the Parties sent their comments to the draft of PO-6 to the Tribunal.

35. On 16 October 2016, the Tribunal issued PO-6 and Annex A and informed the Parties that the pre-hearing telephone conference that had been provisionally agreed upon would be unnecessary, due to the absence of outstanding procedural, administrative, or logistical matters.

36. On 17 October 2016, the Parties confirmed the witnesses and experts that each intended to call at the Hearing.

37. On 19 October 2016, the Tribunal wrote to the Parties to request clarification regarding Exhibit R-0013.

38. On 20 October 2016, the Parties requested that the deadline for the submission of "*Requests to introduce produced documents into the record for use at the hearing*" be postponed until 28 October 2016. The Tribunal granted the extension on the same day.

39. On 25 October 2016, Respondent clarified that its inclusion of Exhibit R-0013 was in error.

40. On 26 October 2016, the Tribunal requested confirmation of the order in which the witnesses would be examined at the Hearing, by 7 November 2016.

41. On 28 October 2016, Claimants submitted a "Request to Introduce New Documents" to the Tribunal. On 31 October 2016, the Tribunal invited Respondent to respond. Respondent responded on 2 November 2016. Taking note of Respondent's comments, the Tribunal admitted the documents on 3 November 2016.

42. On 7 and 8 November 2016, the Parties submitted their respective Hearing Proposals to the Tribunal. After considering the Parties' comments, the Tribunal decided on 9 November 2016 to adopt the first Hearing proposal submitted by Claimants.

43. On 11 November 2016, ICSID informed the Tribunal and the Parties of the logistical arrangements for the Hearing.

44. On 11 November 2016, Respondent informed the Tribunal that Mr. Szatmáry would be available to testify on 6 and 7 December 2016, as needed, and requested that the Tribunal amend the Hearing time.

45. On 13 November 2016, the Tribunal invited Claimants to comment on Respondent's submission on the Hearing schedule.

46. On 14 November 2016, Claimants wrote in reference to Mr. Szatmáry's availability and submitted an amended Hearing schedule to the Tribunal. Claimants also notified the Tribunal of a change in representation and provided the Tribunal an updated list of exhibits including its new submissions Exhibits C-0171 to C-0188.

47. On 15 November 2016, the Tribunal adopted an amended Hearing schedule.

48. On 23 November 2016, Respondent submitted a redlined version of Dr. Guller's witness statement, seeking only to correct footnote numbering, and an application to submit Exhibit R-0013 to the Tribunal.

49. After considering Claimants' 24 November 2016 response to Respondent's motion, the Tribunal admitted Exhibit R-0013 on 26 November 2016.

50. On 28 November 2016, Claimants added three people to their list of participants. On the same day, Respondent raised concerns regarding Mr. David Pusztai's attendance at the Hearing. The Tribunal invited the Parties' responses the following day.

51. On 30 November 2016, Respondent submitted a letter-memorial clarifying its objection to Mr. Pusztai's involvement in the case. Claimants wrote in response, mentioning that counsel had terminated Mr. Pusztai's internship contract. As a result, the Tribunal determined, on the same date, that no further action would be required from it.

52. On 3 December 2016, the Chairman informed counsel that, due to illness, he would be unable to be physically present at the Hearing. To preserve the Hearing Dates, the Chairman proposed that,

in his absence, the Hearing could continue if the Parties were to consent. While Claimants consented to the proposal, Respondent objected to the Hearing being conducted in the absence of the Chairman. As a result, the Hearing was cancelled and the Parties and the Tribunal immediately began discussing available alternate Hearing dates.

53. On 7 December 2016, the Tribunal – having found no other available 4-day periods – invited the Parties to block 22 – 25 May 2017 for a Hearing in London. The following day, Claimants objected to the later Hearing date and urged the Tribunal to again try to find a more suitable date. Respondent accepted the 22 – 25 May 2017 period.

54. On 9 December 2016, the Tribunal asked Claimants to confirm whether – despite Claimants' objection to the lateness of the Hearing – those dates would nonetheless be a possibility for Claimants. Claimants confirmed their availability to hold the Hearing on the proposed dates in May 2017.

55. On 12 December 2016, the Tribunal issued **Procedural Order No. 7 Regarding the New Dates for the Hearing on the Merits ("PO-7")**.

56. On 18 January 2017, the Tribunal – considering that the Parties have relied on numerous arbitration awards, none of which are binding on the present proceedings – wrote to the Parties to request that Respondent submit a copy of the *Edenred* Award under cover of a confidentiality order for use in the present proceedings. The Tribunal considered that the Parties should be given the opportunity to comment on that Award before the Hearing in May.

57. On 30 January 2017, Respondent requested that the Tribunal reconsider its request that Respondent submit the *Edenred* Award to the Tribunal. On the following day, the Tribunal requested Claimants' comments on Respondent's request.

58. On 6 February 2017, Claimants responded that they opposed Respondent's objection and agreed with the Tribunal's request for production of the *Edenred* Award.

59. On 15 February 2017, and after taking the Parties' views into consideration, the Tribunal issued **Procedural Order No. 8 on confidentiality ("PO-8")** and **Procedural Order No. 9 ("PO-9") on document production**, ordering Respondent to produce the *Edenred* Award and granting the Parties until 24 March 2017 to simultaneously submit their respective comments on that Award.

60. On 24 February 2017, Respondent produced the *Edenred* Award to the Tribunal and to Claimants.

61. On 24 March 2017, Claimants requested an extension – until 27 March 2017 – to submit their

comments on the *Edenred* Award. The Tribunal granted this extension on the same day.

62. On 27 March 2017, the Parties simultaneously submitted their respective comments on the *Edenred* Award to the Tribunal. While the Parties agreed that the *Edenred* case has striking similarities with the present matter, they differed on the role that the *Edenred* Award should have in the present matter.

63. On 14 April 2017, Respondent wrote to the Tribunal to notify it that the CJEU was seized of the case *Slovak Republic v. Achmea*. Respondent argued that, while the decision in *Achmea* would not bind this Tribunal, it would become part of EU law and would, thus, become part of the applicable law which the Tribunal would need to consider in determining its jurisdiction. Respondent requested that the Tribunal review its jurisdiction in light of the decision in *Achmea*, once the outcome of that case became known.

64. On 21 April 2017, Claimants wrote in response to Respondent's letter of 14 April 2017, arguing that the Tribunal should consider Respondent's letter to be an untimely objection to jurisdiction. In the alternative, Claimants requested that the Tribunal order Respondent to file its full submission on the objection to jurisdiction by 28 April 2017.

65. On 22 April 2017, Respondent wrote in response to Claimants' letter of 21 April 2017 and proposed that, should the Tribunal require additional written submissions on the matter, that those be provided in the form of limited post-hearing submissions.

66. On 23 April 2017, Claimants urged the Tribunal to reject Respondent's letter of 22 April 2017 and reiterated their request of 21 April 2017.

67. On 24 April 2017, the Tribunal informed the Parties that it required no further submissions regarding the matters presented in Respondent's letters of 14 and 22 April 2017, and Claimants' letters of 21 and 23 April 2017.

68. On 4 May 2017, the Parties informed the Tribunal of their agreement that the experts give presentations *in lieu* of direct examination. The following day, the Tribunal informed the Parties that it agreed with the joint proposal.

69. On 12 May 2017, Respondent proposed reversing the order of the appearance of its two fact witnesses.

70. On 18 May 2017, the Tribunal sent the final Hearing schedule and the list of participants to the Parties.

71. A Hearing was held in London from 22 – 25 May 2017. The following individuals attended the Hearing:

TRIBUNAL	
Professor Dr. Karl-Heinz Böckstiegel	President
The Honourable L. Yves Fortier, PC CC OQ QC	Co-Arbitrator
Sir Daniel Bethlehem, QC	Co-Arbitrator
ICSID SECRETARIAT	
Mr. Francisco Abriani	Secretary of the Tribunal
CLAIMANTS	
Mr./Ms. First Name/ Last Name	***Affiliation***
Counsel	
Ms. Isabelle Michou	Quinn Emanuel Urquhart & Sullivan
Mr. Jehan-Damien Le Brusq	Quinn Emanuel Urquhart & Sullivan
Ms. Lisa Stefani	Quinn Emanuel Urquhart & Sullivan
Mr. Jeremie Kohn	Quinn Emanuel Urquhart & Sullivan
Mr. Laurence Shore	Herbert Smith Freehills
Parties	
Ms. Elizaveta Tukhsanova	
Witness	
Ms. Márta Nagy	
Experts	
Mr. James Nicholson	FTI Consulting
Ms. Juliette Fortin	FTI Consulting
RESPONDENT	
Mr./Ms. First Name/ Last Name	**Affiliation**
Counsel	
Ms. Kiera Gans	DLA Piper
Mr. Stanley McDermott	DLA Piper
Ms. Natalie Kanerva	DLA Piper
Ms. Aurélie Ercoli	DLA Piper
Ms. Rachel Hamilton	DLA Piper
Mr. Andras Nemescsoi	DLA Piper
Mr. David Kohegyi	DLA Piper

Ms. Zsofia Deli	DLA Piper
Mr. Cosimo Spagnolo	DLA Piper
Mr. Andras Lovas	Sarhegyi and Partners Law Firm
Witnesses	
Dr. Zoltán Guller	
Mr. Kristof Szatmáry	
Experts	
Mr. Brent Kaczmarek	Navigant Consulting
Mr. Kiran Sequeira	Navigant Consulting
Ms. Emily Khan	Navigant Consulting
Mr. Stuart Dekker	Navigant Consulting

72. On 22 May 2017, Claimants informed the Tribunal that LCD had changed its company name to UP. Claimants confirmed that UP remains the 100% owner of CD Internationale, which in turn remains the 100% owner of CD Hungary and the 100% indirect owner of Výroba. Claimants provided the Tribunal an updated version of Exhibit C-0002 and new Exhibits C-0189 – C-0191.

73. On 24 May 2017, the Tribunal wrote to the Parties with questions to be addressed in their Closing Statements and post-hearing briefs.

74. On 26 May 2017, the Tribunal issued **Procedural Order No. 10 Regarding the Procedure After the Hearing on the Merits ("PO-10")** to the Parties.

75. On 16 June 2017, the Parties informed the Tribunal that they had agreed on a postponement of the deadline to submit their transcript corrections from 16 June 2017 until 20 June 2017.

76. On 26 June 2017, in light of the CJEU proceedings in the case of *Slovak Republic v. Achmea*, the Tribunal proposed several changes to PO-10, to be issued in the form of a further procedural order, and requested the Parties' comments.

77. On 27 June 2017, the Tribunal wrote to the Parties in response to LCD's name change to UP and advised that, if it did not hear from the Parties by 5 July 2017, the Tribunal and ICSID would change the reference in these proceedings.

78. On 29 June 2017, Claimants wrote in response to the Tribunal's proposed amendments to PO-10. Respondent submitted its response on 3 July 2017. Claimants made two objections to Respondent's 3 July 2017 responses on 5 July 2017. Respondent replied on the same day.

79. On 7 July 2017, the Tribunal issued **Procedural Order No. 11 Regarding Post-Hearing Briefs ("PO-11")** and notified the Parties that this arbitration is now referred to as "*UP and C.D Holding Internationale v. Hungary*" and that the ICSID website would be updated accordingly.

80. On 1 August 2017, Claimants notified the Tribunal that Mr. Laurence Shore would cease to represent Claimants once his position with Herbert Smith Freehills ended on 30 August 2017.

81. On 22 September 2017, Claimants requested that the Tribunal authorize both Parties to submit post-hearing briefs of 100, rather than 75 pages. By email of the same date, Respondent indicated that had no objection to the proposed extension.

82. On 22 September 2017, Claimants and Respondent submitted their respective post-hearing briefs to the Tribunal.

83. On 26 September 2017, the Tribunal wrote to the Parties, stating that it had no objection to the Parties' agreement on the extension of page limits for the post-hearing briefs.

84. On 27 September 2017, Respondent wrote to the Tribunal noting that Claimants – despite the agreed extension to 100 pages – submitted 118 pages of material to the Tribunal. Respondent urged the Tribunal to (1) refrain from reading the Annexes to Claimants' submission and/or (2) consider this matter as part of an eventual cost award. Claimants responded to Respondent's email on the same day.

85. On 28 September 2017, the Tribunal responded to the Parties, indicating that it would keep these issues in mind in the course of its deliberations and for the purposes of its award, including costs.

86. On 15 December 2017, the Tribunal informed the Parties that it had its first deliberation and hoped to issue the Award in Spring 2018. The Tribunal invited the Parties, pursuant to §§ 3.1 and 3.2 of PO-10, to submit their Statements of Costs to the Tribunal by 12 January 2018 and to submit their comments on the Statement of Costs submitted by the other side by 26 January 2018.

87. On 12 January 2018, the Parties simultaneously submitted their respective Statements on Costs to the Tribunal.

88. On 26 January 2018, by simultaneous submission, Claimants submitted their comments to Respondent's Statement of Costs and Respondent informed the Tribunal that it had no further comments on Claimants' Statement of Costs.

89. On 6 March 2018, Respondents informed the Tribunal that the CJEU rendered its judgment in the *Achmea* case (the "*Achmea* Decision") and urged the Tribunal to, therefore, decline jurisdiction in this matter or, alternatively, to rule that it is precluded from issuing a decision on the merits.

90. On 7 March 2018, the Tribunal invited the Parties to submit their comments regarding the relevance, if any for the present Arbitration, of the *Achmea* Decision.

91. On 28 March 2018, Respondent submitted its comments related to the *Achmea* Decision.

92. On 18 April 2018, Claimants submitted their comments related to the *Achmea* Decision, together with exhibits CLA-0256 and CLA-0257.

93. On 2 May 2018, Respondent submitted its Response to Claimants' letter to the Tribunal of 18 April 2018 concerning the *Achmea* Decision.

94. On 16 May 2018, Claimants submitted their Response to Respondent's comments concerning the *Achmea* Decision, together with new legal exhibits CLA-0258 – CLA-0263 and an updated Table of Authorities.

95. On 20 August 2018, the EC lodged its Application for Leave to Intervene as a Non-Disputing Party, together with two supporting Annexes, with the Tribunal.

96. On 22 August 2018, the Tribunal invited the Parties to submit their comments to the EC's Application, by Friday, 24 August 2018.

97. On 24 August 2018, the Parties submitted their respective comments to the EC's Application.

98. On 27 August 2018, the Tribunal issued **Procedural Order No. 12 Regarding the European Commission's Application ("PO-12")**, concluding that the EC's Application must be denied according to Rule 37(2) of the ICSID Arbitration Rules.

99. By letter dated 27 August 2018, the Tribunal closed the proceedings in accordance with Rule 28(1) of the ICSID Arbitration Rules.

IV. THE PARTIES' REQUESTS

A. CLAIMANTS' REQUESTS

100. Claimants' most recent iteration of its request for relief is contained in their Post-Hearing Submission ("CPHB-I"), where Claimants provided the following summary of relief sought:

In light of the above, Claimants ask the Tribunal to:

- *Find that Hungary expropriated UP and C.D Holding Internationale of their investment in Hungary, in breach of Art. 5(2) of the BIT;*
- *Find that Hungary (i) failed to accord UP and C.D Holding Internationale's investment in Hungary fair and equitable treatment and (ii) adopted unjustified and discriminatory measures that impeded the management, maintenance, use, enjoyment or liquidation of that investment, in breach of Art. 3 of the BIT;*

and consequently

- *Award compensation to UP and C.D Holding Internationale for their entire loss in the amount of €39,465,434 plus compound interest and net of any taxes, subject to adjustment until the date of payment;*
- *Order Hungary to pay all costs, expenditures and fees in respect of the arbitration proceedings including legal fees incurred by UP and C.D Holding Internationale*.[3]

101. The only difference between this summary of relief sought and Claimants' previous requests is the amount of the alleged entire loss, which in Claimants' Request for Arbitration was "*EUR 18.5 million, subject to adjustment*",[4] in their Memorial was "*€31,163,000, plus compound interest subject to adjustment until the date of payment*",[5] and in their Reply was "*€35,589,000, plus compound interest and net of any taxes, subject to adjustment until the date of payment.*"[6]

B. RESPONDENT'S REQUESTS

102. In its Counter-Memorial ("R-I"), Respondent made the following requests:

> *307. Accordingly, and for the reasons set forth above, Hungary respectfully requests that the Tribunal:*
>
> *a. Decline jurisdiction over this dispute with respect to Claimants' claims under Article 3 of the BIT due to the absence of Respondent's consent to ICSID jurisdiction over such claims;*
>
> *b. Dismiss all of Claimants' claims under Article 5(2) of the BIT;*
>
> *c. In the event the Tribunal determines that it has jurisdiction over the claim under Article 3, to dismiss those claims in their entirety; and*
>
> *d. Award Hungary all of the costs and expenses incurred in these*

3 CPHB-I Annex No. 1.

4 RfA § 122.

5 C-I § 419.

6 C-II § 438.

proceedings, including attorneys' fees.[7]

103. In its Rejoinder ("R-II"), Respondent requested the Tribunal to:

> *(1) Dismiss all of the Claimants' claims under Article 5(2) and Article 3 of the BIT;*
>
> *(2) Award Hungary all of the costs and expenses incurred in these proceedings, including attorneys' fees.*[8]

104. Respondent's 2 May 2018 letter regarding the *Achmea* Decision contained the following request for relief:

> *94. For the foregoing reasons, Hungary requests the Tribunal to conclude that it lacks jurisdiction to adjudicate this dispute owing to the preclusion of Article 9(2) of the BIT. In the alternative Hungary requests the Tribunal to find that it is barred from exercising any jurisdiction it may have and from rendering an award on the merits of this case.*[9]

V. STATEMENT OF FACTS

A. SUMMARY OF THE FACTS

105. The following summary is based on the submissions from the Parties, and is without prejudice as to their relevance for the decisions of the Tribunal.

106. According to Respondent, "*fringe benefits*" refer to remuneration other than wages that are paid to employees as part of their compensation packages. Historically, Respondent has used vouchers – "*a subsidy that grants limited purchasing power to an individual to choose among a restricted set of goods and services*" – to facilitate the provision of fringe benefits.[10] The employers' incentive to buy vouchers, and the employees' incentive to use them, hinges on preferential tax treatment. Unlike standard cash compensation, vouchers are either tax exempt (both from payroll tax for employers and income tax for employees) or are taxed at a lower rate, within a determined

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[7] R-I § 307.

[8] R-II § 356.

[9] Respondent's Letter (2 May 2018).

[10] R-II §§ 22 – 23; Gáspár Fajth and Judit Lakatos, *Fringe Benefits in Transition in Hungary*, *in* Enterprise and Social Benefits After Communism 167 (Martin Rein et al. eds., 1997) 167 **[RLA-0221]**; Martin Rein, Barry L. Friedman and Andreas Worgotter, Enterprise and Social Benefits After Communism, Introduction (Martin Rein et al. eds., 1997) **[RLA-0230]**; C. Eugene Steuerle, *Common Issues for Voucher Programs*, in Vouchers and the Provision of Public Services 3, 4 (C. Eugene Steuerle et al. eds., 2000) **[RLA-0235]**.

limit.[11] Through the use of vouchers, the government can achieve specific social goals by encouraging employees to consume particular goods and services, and employers can incentivize employees through a means other than wages.[12]

107. In 1989, meal vouchers were introduced in Hungary as an alternative for companies that could not provide employees a canteen.[13] Respondent states that "*the meal voucher originated in pursuit of a social good in recognition of the fact that a healthy and well-fed workforce is more productive*."[14]

108. The fringe voucher business consists of the following sequence: (1) an issuer (like CD Hungary) sells vouchers to employers at face value, plus a commission; (2) the employer gives vouchers to employees as part of a broader compensation package; (3) employees use their vouchers to pay for goods and services at affiliates that have entered into an agreement with the issuer to accept such vouchers as payment; and (4) the affiliates claim payment from the issuer for the face value of the collected vouchers, minus a commission. Issuers derive revenues from: (1) the commissions charged to employers and affiliates; (2) investments made during the period between voucher issuance to employers and reimbursement to affiliates; and (3) unclaimed vouchers (such as lost or expired vouchers), the face value of which is retained by the issuer.[15] According to Respondent, this carries the risk that issuers operate as banks and could be unable to meet payment obligations on demand.[16] Claimants contest this and argue that although capital requirements

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11 C-I § 92; R-I § 29; R-II § 27; Act XLV of 1989 on the Income Tax of Private Individuals, in force as of 1 January 1990, § 7(2)4, 7(2)12 **[RLA-0192]**.

12 R-II §§ 23, 26; Gáspár Fajth and Judit Lakatos, *Fringe Benefits in Transition in Hungary*, *in* Enterprise and Social Benefits After Communism 167 (Martin Rein et al. eds., 1997) 169 **[RLA-0221]**; C. Eugene Steuerle, *Common Issues for Voucher Programs*, in Vouchers and the Provision of Public Services 3, 4 (C. Eugene Steuerle et al. eds., 2000) **[RLA-0235]**.

13 KPMG report, Meal Voucher Reform in Hungary (2012) **[R-0024]**.

14 R-II § 24.

15 C-I §§ 87 – 95; R-I §§ 26 – 32; Sample CD Hungary vouchers **[C-0041]**; Contract between CD Hungary and Tesco-Global ZRT (as amended) (14 February 2011) **[C-0042]**; Extract from Internal CD Hungary presentation (31 October 2006) [**C-0043]**; Extract from Mazars Summary Notes on CD Hungary, "Le Chèque Déjeuner Kft., Hungary", dated 31 December 2009, 31 December 2010, and 31 December 2011 – 31 December 2013 **[C-0044]**; Witness Statement of Mr. Benedek Dér (19 January 2015) [hereinafter "Dér Statement"], §§ 10 – 15 **[CWS-1]**; Witness Statement of Ms. Márta Nagy (19 January 2015) [hereinafter "First Nagy Statement"], §§ 8 – 17, 22 **[CWS-2]**; Witness Statement of Mr. Yvon Legrand (19 January 2015) [hereinafter "Legrand Statement"], § 11 **[CWS-3]**; FTI Report (Mr. Anthony Charlton) (19 January 2015) [hereinafter "First FTI Report"], §§ 4.45, 4.61, 4.65 **[CEX-1]**; KPMG report, Meal Voucher Reform in Hungary (2012) **[R-0024]**; HM Revenue & Customs, Luncheon Vouchers: Repeal of Relief **[RLA-0110]**.

16 C-II § 44; R-I § 54; Janos Kun, On Cash Substitutes (A study), § 3.2.8 Meal voucher, holiday voucher **[R-0003]**; Witness Statement of Dr. Zoltán Guller (10 July 2015) Revised (re-submitted 23 November 2016)

were not mandated, Claimants would have complied with such had they existed.[17]

109. By 1992, dependence on the fringe benefit system was such that non-wage compensation amounted to 56% of employee compensation.[18]

110. In 1995, Respondent enacted Hungarian Act CXVII of 1995 on Personal Income Tax ("PIT Law"), which instituted reforms to the voucher system.[19] These reforms maintained the tax-free status afforded to meals provided at the workplace (hot meal) and to vouchers used to purchase food (cold meal).[20] Employees could receive up to HUF 1,200 per month of tax-free cold meal vouchers and up to HUF 2,000 of tax-free hot meal vouchers.[21] According to Respondent, the goal of the 1995 PIT was to allow the voucher system to develop and to achieve the policy objectives driving the system, and to regulate it once it had evolved and the circumstances so warranted.[22] Each year, Respondent amends the PIT and enacts a new tax scheme governing the fringe benefit system.[23]

111. In late 1995, Claimants decided to enter the Hungarian market.[24] LCD (now UP) opened an office in Budapest in October 1996.[25] Le Chèque Déjeuner Kft ("CD Hungary") is Claimants' wholly-

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[hereinafter "First Guller Statement"], §§ 15, 20 **[RWS-1]**; Witness Statement of Mr. Kristóf Szatmáry (15 July 2015) [hereinafter "Szatmáry Statement"], § 13 **[RWS-2]**.

17 C-II §§ 45 – 49; J. Bindics and N. Szabó, Fringe Benefits in the EU Member States, Ernst & Young Presentation (13 March 2012) 10, 12 **[R-0022]**; Second Witness Statement of Ms. Márta Nagy (6 April 2016) [hereinafter "Second Nagy Statement"], §§ 13 – 19 **[CWS-4]**; First Guller Statement, §§ 19, 20 **[RWS-1]**.

18 R-II §§ 28 – 29; Gáspár Fajth and Judit Lakatos, *Fringe Benefits in Transition in Hungary*, *in* Enterprise and Social Benefits After Communism 167 (Martin Rein et al. eds., 1997) 175 **[RLA-0221]**; József Poór and Katalin Óhegyi, *The Cafeteria System in Hungary: Development and New Directions*, 3 J. Med. Eng'g Mgmt. & Competitiveness 6 (2013) **[RLA-0229]**; Martin Rein and Barry L. Friedman, *Enterprise Social Benefits and the Economic Transition in Hungary, in* Enterprise and Social Benefits After Communism 135 (Martin Rein et al. eds., 1997) **[RLA-0231]**; Second Report Navigant Consulting Inc (Mr. Brent C. Kaczmarek, Mr. Kiran P. Sequeira) (21 July 2016) [hereinafter "Second Navigant Report"], § 45 **[REX-2]**.

19 R-I § 36; PIT Law **[RLA-0083]**; First Guller Statement, § 9 **[RWS-1]**; Szatmáry Statement, § 10 **[RWS-2]**.

20 R-II § 31.

21 R-II § 32; PIT Law, § 8.17 **[RLA-0083]**.

22 R-I § 37.

23 C-I § 108; R-II § 35; Act XLV of 1989 on the Income Tax of Private Individuals, in force as of 1 January 1990 **[RLA-0192]**; Act XLV of 1989 on the Income Tax of Private Individuals, in force as of 1 January 1991, § 7 **[RLA-0193]**; Dér Statement, § 27 **[CWS-1]**.

24 R-I § 39; R-II § 30; Legrand Statement, §§ 11 – 13 **[CWS-3]**; PIT Law, §§ 8.12, 8.18, 8.21 **[RLA-0083]**; First Report Navigant Consulting Inc (Mr. Brent C. Kaczmarek, Mr. Kiran P. Sequeira) (17 July 2015) [hereinafter "First Navigant Report"], Appendix D **[REX-1]**.

25 C-I §§ 86, 96; LCD, Extracts from the meeting minutes of the Board of Directors dated 17 October 1996, 22 November 2011, and 30 January 2012 **[C-0045]**.

owned subsidiary in Hungary. It was created in November 1996 and began operations in 1997 as a fringe voucher issuer.[26] CD Hungary was primarily active in the food voucher business. It marginally issued gift vouchers and school supplies vouchers for public and private sector clients.[27]

112. In 1998, Respondent introduced a new type of subsidized employee benefit – a holiday voucher – to provide tax-free status for domestic tourism. Only the Hungarian National Recreation Fund ("MNUA") was authorized to issue these vouchers.[28]

113. In 1999 and 2000, two tax reforms were passed. First, the tax rate applicable to cold meal vouchers and gift vouchers was substantially increased, prompting CD Hungary to focus on hot meal vouchers only. Later, the tax rates applicable to hot and cold meal vouchers were re-aligned, prompting CD Hungary to create a new type of vouchers that could be redeemed for both meals.[29]

114. In 2000, CD Hungary expanded by purchasing a regional issuer.[30] Also in 2000, CD Hungary – together with other voucher issuers – formed a lobbying organization called the "*Association des Emetteurs de Titres de Restauration*" ("AETR").[31]

115. On 24 May 2002, Claimants state that Le Chèque Déjeuner Výroba – Výroba, s.r.o. ("Výroba") was created as a wholly owned subsidiary of LCD (now UP) to supply CD Hungary and other eastern European LCD (now UP) subsidiaries with pre-printed vouchers.[32]

116. In 2003, Respondent amended the PIT to expand the voucher system for fringe benefits and

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26 RfA §§ 14, 17; C-I §§ 13, 96; Constitutive instrument, Le Chèque Déjeuner Kft., dated 13 November 1996, Art. 7 **[RfA Exhibit C-6]**; Corporate copy, CD Hungary dated 9 July 2013 **[RfA Exhibit C-7]**; Le Chèque Déjeuner Kft., articles of association updated as at 14 March 2013 **[RfA Exhibit C-8]**; Constitutive instrument, CD Hungary (13 November 1996) **[C-0003]**; Legrand Statement, § 15 **[CWS-3]**.

27 C-I § 108; Hungarian Act CXVII of 1995 on Personal Income Tax Summary Table (1996-2014) [hereinafter "PIT Summary Table (1996-2014)"] **[C-0046]**; PIT Law as amended in 1996, effective 1 January 1997 **[C-0052]**; PIT Law as amended in 2000, effective 1 January 2001 **[C-0053]**; PIT Law as amended in 2001, effective 1 January 2002 **[C-0054]**.

28 R-I § 40.

29 Tribunal's Decision on Preliminary Issues of Jurisdiction at § 9.

30 C-I § 105; First Nagy Statement, § 24 **[CWS-2]**; Legrand Statement, § 20 **[CWS-3]**.

31 R-I § 88.

32 C-I § 109; Notarised deed (24 May 2002) **[C-0055]**; "*Contrats Mandataires*" between Výroba and CD Hungary - 1 January 2004 - 22 December 2008 - 15 December 2010 - 29 August 2011 **[C-0056]**.

increased the tax-free limits.[33] Also in 2003, Respondent declared the "*Johan Bela*" National Programme for the Decade of Health, which aimed to expand life expectancy by 3 years over the next 10 years. The program focused in part on meal provision in schools and mass catering (canteen) services.[34]

117. In 2004, CD Hungary first became profitable.[35] CD Hungary was profitable between 2004 – 2009.[36]

118. In 2005, Respondent amended the PIT and doubled the limit for food and meal vouchers, to HUF 4,000 and HUF 8,000, respectively.[37] In the same year, the ILO reported that the goal of improving nutrition should be implemented through the voucher system.[38]

119. In November 2006, a study on meal vouchers and holiday vouchers was completed by Janos Kun for the Hungarian Financial Supervisory Authority ("PSZAF").[39]

120. In 2008, Respondent was hit particularly hard by the global financial crisis and requested IMF, World Bank, and EU assistance.[40] Respondent's industrial production plummeted 23% year-on-end.[41] According to Respondent, "*the 2008 economic crisis led to serious debt problems and budget deficits that forced the Government to re-evaluate the large amount of tax revenue that it*

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33 R-I § 41; PIT Law as amended in 2002, effective 1 January 2003 **[RLA-0084]**; Act XCI of 2003 on the amendment of laws governing taxes, contributions and other payments to the state **[RLA-0089]**.

34 R-I §§ 42 – 44; 'Johan Bela' National Programme for the Decade of Health, 2003 **[R-0002]**; PIT Law as amended in 2004, effective 1 January 2005 **[RLA-0085]**; PIT Law as amended in 2007, effective 1 January 2008 **[RLA-0086]**; Christopher Wanjek, *Food at Work: Workplace Solutions for Malnutrition, Obesity and Chronic Diseases*, International Labour Office (2005) [hereinafter "Wanjek, *Food at Work* (2005)"], 172 – 173 **[RLA-0109]**; First Navigant Report, § 76 **[REX-1]**.

35 C-I §§ 103, 126; R-I § 45; C-II § 23; Second FTI Report (Mr. James Nicholson) (8 April 2016) [hereinafter "Second FTI Report"], § 2.34 **[CEX-2]**; First Navigant Report, § 99 **[REX-1]**.

36 C-I § 126.

37 R-I § 43; PIT Law as amended in 2004, effective 1 January 2005 **[RLA-0085]**; PIT Law as amended in 2007, effective 1 January 2008 **[RLA-0086]**.

38 R-I § 42; "Johan Bela" National Programme for the Decade of Health, 2003 **[R-0002]**; Wanjek, *Food at Work* (2005), 172 – 173 **[RLA-0109]**.

39 Janos Kun, On Cash Substitutes (A study), § 3.2.8 Meal voucher, holiday voucher **[R-0003]**.

40 C-I § 23; R-I §§ 9, 48; R-II § 42; European Commission [hereinafter "EC"], Directorate-General for Economic and Financial Affairs, *Macroeconomic imbalances – Hungary*, Occasional Papers 106 (July 2012) **[RLA-0097]**; *OECD Economic Surveys: Hungary 2010*, OECD 2010/2 (February 2010) **[RLA-0102]**; *Hungary Financial Markets Profile 2008-09*, Marketswiki (9 September 2011) **[RLA-0118]**; David Jolly, *IMF Bailout Lifts Hungarian Markets*, N.Y. Times (29 October 2008) **[RLA-0120]**; Nicholas Kulish, *Crisis Comes to Hungary in Loans of Francs and Euros*, N.Y. Times (19 October 2008) **[RLA-0121]**.

41 R-I § 9; *Hungary Financial Markets Profile 2008-09*, Marketswiki (9 September 2011) **[RLA-0118]**.

was foregoing in the form of tax exemptions for fringe benefits."[42] According to Respondent, the social utility and effectiveness of the fringe benefit system had been diminished by widespread misuse of vouchers, unwarranted commissions, and a general lack of oversight, all of which made the system no longer serve its public purpose.[43] Claimants agree that there was political change following the 2008 financial crisis, but state that Respondent has failed to prove the existence of "*numerous structural problems, rampant misuse, and economic inefficiencies*."[44]

121. One of the initial austerity measures adopted was the elimination of any tax advantage afforded to meal vouchers.[45] In 2009, prior to becoming Respondent's Prime Minister, Mr. Gordon Bajnai introduced the Reform 2009, which included the abolition of meal vouchers and an increase in taxes on all voucher types as of 1 January 2010.[46] Reform 2009 went into force in 2010.[47] According to Claimants, Reform 2009 introduced the taxation of hot meal vouchers and effectively eliminated cold meal vouchers by taxing them at 97.89%. In response, Claimants reorganized their commercial team and rethought their commercial strategy. Claimants increased the total value of vouchers issued in 2010.[48]

122. In 2010, Multi-Pay Zrt developed an electronic card that could be used to purchase hot and cold meals.[49]

123. In January 2010, Claimants and AETR prepared proposals to enhance the economic development

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42 R-II § 42.

43 R-I §§ 52 – 59; R-II §§ 42, 48 – 49; Janos Kun, On Cash Substitutes (A study), § 3.2.8 Meal voucher, holiday voucher **[R-0003]**; *Ocsmány Módon Verik át a Megszorult Családokat!*, valasz.hu (3 April 2010) **[RLA-0111]**; Mészáros Bálint, *Drága Ingyenebéd (Expensive Meals)*, Magyar Narancs (June 2010) 4 **[RLA-0112]**; Böröczkyné Verebélyi Zsuzsanna, *What Type of Goods Can the Hot Meal Voucher Be Used for?(Mire váltható be a melegétel utalvány?)*, Adónavigátor (25 June 2010) **[RLA-0127]**; Adam Viktor, *Cafeteria - What a Great Business to Issue Vouchers!*, Napi Online (11 June 2009) **[RLA-0128]**; First Guller Statement, §§ 14 – 17, 20 – 23 **[RWS-1]**; Szatmáry Statement, §§ 12, 13, 18 **[RWS-2]**.

44 C-II § 69; *see generally* C-I §§ 17, 23 – 58; C-II § 27 – 40, 50 – 69.

45 R-II § 43; Dr. Péter Oszkó, T/9817 Draft Bill on the Amendment Amending the Transformation of Tax System (May 2009) **[R-0048]**.

46 C-I § 128; R-I §§ 10, 50; PIT Summary Table (1996-2014) **[C-0046]**; PIT Law as amended in 2009, effective 1 January 2010 **[C-0067]**; *PM Promises Pain*, The Budapest Times (20 April 2009) **[RLA-0124]**.

47 C-I § 128; PIT Summary Table (1996-2014) **[C-0046]**; PIT Law as amended in 2010, effective 1 January 2011 **[C-0068]**.

48 C-I § 130; C-II § 123; Summary table, "Le Chèque Déjeuner Kft. 1997-2012" **[C-0057]**; Dér Statement, § 34 **[CWS-1]**; First Nagy Statement, § 39 **[CWS-2]**.

49 C-II § 108; R-I § 104; Second Nagy Statement, §§ 52 – 53 **[CWS-4]**; Certificate of incorporation for Multi-Pay Fizetést Könnyítő Szervező és Szolgáltató Zártkörűen Működő Részvénytársaság, accessed on 17 July 2015 **[R-0036]**.

of the voucher market and to "*combat and sanction the misuse of vouchers*."[50]

124. According to Respondent, Mr. Bajnai's reforms were not popular. In the 2010 election, the FIDESZ Party took office with a clear mandate to reform to the fringe benefit system while maintaining popular social policies.[51] According to Respondent, the new government put together a team to review the voucher system to (1) identify existing problems and evaluate the system's effectiveness in achieving its goals, and (2) remediate and develop reform proposals.[52]

125. On 5 May 2010, Mr. Viktor Orbán (Prime Minister of Hungary) made a speech in the Parliamentary Assembly entitled "*Hold individuals accountable and saving the country from economic collapse*", wherein he advocated for sweeping reforms.[53]

126. On 28 September 2010, Mr. Endre Horváth sent Dr. Ádám Balog (Deputy Under-Secretary of Economic Development) a memo on the "*Brief Proposal for the Introduction of the Szechenyi Revitalization Card*" ("SZÉP Card Proposal").[54] According to Respondent, the SZÉP Card was initially conceived as an electronic card to replace the holiday voucher, which at the time was exclusively provided by the MNUA.[55]

127. Claimants state that, in November 2010, the Hungarian government adopted a constitutional amendment limiting the scope of the Constitutional Court's review of acts and decisions related

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50 R-II § 128; C-II §§ 53, 128; Proposal from the AETR concerning the universal regulation of the system for allocating benefits in kind (January 2010) **[C-0145]**; Second Nagy Statement, §§ 9, 24 – 25 **[CWS-4]**.

51 R-I §§ 51; R-II §§ 45 – 46; Eurostat: Statistics Explained, *Glossary: At risk of poverty or social exclusion (AROPE)* **[R-0044]**; Eurostat, *General Government Deficit and Surplus – Annual Data* (2004-2015) **[R-0046]**; Központi Statisztikai Hivatal, *Poverty Line 2010* (June 2011) **[R-0050]**; Chris Bryant, *Orbán Aims to Calm Nerves*, Financial Times (9 June 2010) **[RLA-0113]**; *Fidesz Wins Hungary Election*, Budapest Business Journal (12 April 2010) **[RLA-0117]**; Krisztina Than and Gergely Szakacs, *Fidesz Wins Hungary Election With Strong Mandate*, Reuters (11 April 2010) **[RLA-0126]**; Consolidated Version of the Treaty on the Functioning of the European Union O.J. C 115 / 99 (2008) **[RLA-0205]**; Marton Dunai and Krisztina Than, *Hungary's Fidesz Wins Historic Two-thirds Mandate*, Reuters (25 April 2010) **[RLA-0241]**; László Tóth, *A Fast Working System - The Széchenyi Club Is Working on Boosting Tourism*, MNO (23 March 2010) **[RLA-0249]**; First Guller Statement, §§ 14 – 17 **[RWS-1]**.

52 R-I § 52; First Guller Statement, §§ 14 – 17 **[RWS-1]**.

53 C-I § 23; Mr. Viktor Orbán (Prime Minister of Hungary), Speech at the Parliamentary Assembly, "Hold individuals accountable and saving the country from economic collapse" (5 May 2010) **[C-0011]**.

54 Memorandum to Mr. Ádám Balog, Deputy Under Secretary, from Mr. Endre Horváth, Subject: Brief proposal for the introduction of the Széchenyi revitalization card (28 September 2010) **[R-0006]**.

55 R-II § 61; RPHB-I § 68; Registry of Széchenyi-terv Gazdaságfejlesztő Társaság **[R-0063]**; Memorandum for the Minister from Mr. Kristóf Szatmáry and Dr. Ádám Balog , Subject: The future of fringe benefits (31 May 2011) 2 **[R-0010]**; László Tóth, *A Fast Working System - The Széchenyi Club Is Working on Boosting Tourism*, MNO (23 March 2010) **[RLA-0249]**; Second Nagy Statement, § 12 **[CWS-4]**.

to central taxes.[56]

128. On 18 November 2010, there was a meeting between President Sarkozy of France and Prime Minister Orbán of Respondent regarding difficulties that French businesses faced in Hungary. They agreed to appoint two mediators to act as facilitators.[57]

129. On 13 December 2010, the SZÉP Card Proposal was submitted to public administrative bodies and agencies.[58]

130. According to Claimants, CD Hungary controlled 18.1% of the Hungarian voucher market by 2011.[59]

131. Reform 2010 went into force on 1 January 2011.[60] Reform 2010 reintroduced cold meal vouchers and recalibrated the taxes applicable to the remaining vouchers.[61]

132. The French – Hungarian mediation was announced on 14 January 2011.[62]

133. On 28 January 2011, Ms. Róza Nagy (Undersecretary of Administration, Ministry of National Economy of Hungary) received a letter regarding consultations on the draft proposal for the government decree on rules of issuance and utilization of the SZÉP Card from the Ministry of Public Administration and Justice ("KIM") Undersecretary for Administration.[63]

134. On 8 February 2011, Respondent's public administrative bodies and agencies closed the assessment and evaluation of the SZÉP Card Proposal.[64]

135. On 15 February 2011, the Ministry for National Economy noted, in a letter to the PSZAF, that it

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56 C-I § 33.

57 Letter to Prime Minister Viktor Orbán from President Nicolas Sarkozy (23 November 2011) **[R-0017]**.

58 Proposal to be submitted to the Government with regard to the Government Decree on the Rules and Regulations for the Issue and the Utilization of the Széchenyi Recreational Card (28 March 2011) [hereinafter "SZÉP Card Proposal"] **[R-0008]**.

59 C-II § 23; Second FTI Report, § 2.34 **[CEX-2]**.

60 C-I §§ 128, 136.

61 *Id*., at § 128.

62 Letter to Prime Minister Viktor Orbán from President Nicolas Sarkozy (23 November 2011) **[R-0017]**.

63 Letter to Ms. Róza Nagy, Undersecretary for Administration, Ministry of National Economy, Subject: Proposal for government decree on the rules of the issuance and utilization of Széchenyi Recreation Card (administrative consultation, repeated consultation) (28 January 2011) **[R-0007]**.

64 SZÉP Card Proposal **[R-0008]**.

would be important to ensure that the 2-3 largest actors should be able to comply with the requirements for issuing SZÉP Cards.[65] The Government wanted the SZÉP Card to offer electronic services and have the security, safety, and surety akin to that of electronic bank cards. It was also vital that an issuer could provide nationwide coverage to serve rural and urban regions. According to Respondent, initially the government wanted itself or a state-run entity to issue the SZÉP Cards, but later opted for a market-based approach.[66]

136. On 23 February 2011, Mr. Zoltán Horváth (Deputy President of the Hungarian Competition Authority) wrote a letter to Mr. Kristof Szatmáry (Minister of State, Ministry for National Economy), finding the SZÉP Proposal acceptable in terms of competition law.[67]

137. On 28 February 2011, a letter from Mr. László Balogh provided advice on who could become a SZÉP Card Issuer.[68]

138. On 12 April 2011, Decree No. 55/2011 on the Rules of Issuance and Use of the Szechnyi Recreational Card ("Decree No. 55/2011") was published. Decree No. 55/2011 introduced the SZÉP Card (a dematerialized alternative to paper vouchers).[69]

139. Decree No. 55/2011 created a national electronic card system that allowed Hungarian employees to receive up to HUF 300,000 annually for expenditures related to holidays. As a result of deliberations from the Ministry of the Interior, Ministry of Defense, KIM, Ministry of Foreign Affairs, Ministry of Natural Resources, Ministry of National Development, and Ministry of Rural Development, the use of the SZÉP Card expanded beyond travel expenses to include other goods and services.[70] Pursuant to Decree No. 55/2011, the total costs for the use of the SZÉP Card could

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65 C-II § 83; R-II § 235; Letter from Mr. Endre Horváth (Deputy Minister of State, responsible for economic development) to Mr. László Balogh (Vice-President, the PSZAF) (15 February 2011) **[C-0148]**.

66 R-I § 74; SZÉP Card Proposal **[R-0008]**; Memorandum for the Minister from Mr. Kristóf Szatmáry and Dr. Ádám Balog , Subject: The future of fringe benefits (31 May 2011) **[R-0010]**.

67 Letter from Mr. Zoltán Horváth (Deputy President of the Hungarian Competition Authority) to Mr. Kristof Szatmáry (Minister of State, Ministry for National Economy) (23 February 2011) **[C-0150]**.

68 Letter from Mr. László Balogh (Vice-President, the PSZAF) to Mr. Endre Horváth (Deputy Minister of State, responsible for economic development) (28 February 2011) **[C-0149]**.

69 Decree No. 55/2011 **[C-0073]** / **[RLA-0091]**.

70 R-I § 70; SZÉP Card Proposal **[R-0008]**; Submission for the Government to amend Government Decree No. 55/2011. (IV. 12) on the rules of the issuance and use of Széchenyi Recreational Card (30 May 2011) **[R-0009]**; Proposal on the modification of government decree 55/2011 (IV.12) on the rules of issuance and usage of Széchenyi Recreational Card (18 July 2011) **[R-0012]**; National Ministry of Economics, Proposal for the Government in Connection with the Amendment of Certain Tax Acts and Other Related Acts (11 October 2011) **[R-0016]**; Minister of National Economy, Proposal on the amendment of Government Decree 55/2011

not exceed 1.5% of the value of the payments made.[71]

140. The Parties dispute the amount of research that led to Decree No. 55/2011. According to Respondent, after a three month review and comment period, on 28 March 2011, Respondent received an official proposal stating that the purpose of the SZÉP Card would be to facilitate the utilization of services under the fringe benefits scheme in a more efficient and less expensive way.[72] The proposal made it clear that the goal was to raise standards related to the issuance of such vouchers. It was estimated that the SZÉP Card scheme would generate a 35% increase in the turnover of the domestic tourism industry within a period of 3 – 5 years. Respondent states that it was also believed that issuers would be able to make a profit in approximately three years.[73] Claimants have stated that there is no evidence of any review or structural problems and, regardless, that the measures undertaken by Respondent were not necessary to fix the alleged problems.[74]

141. In May 2011, MNUA was reorganized into a non-profit corporation wholly owned by Respondent.[75]

142. On 4 May 2011, Claimants and Tesco modified their contract on vouchers, retroactive to 14 February 2011.[76]

143. On 2 July 2011, Dr. Bence Rétvári (Member of Parliament) made Speech No. 211/324 at a Plenary Session of Parliament about the duty to provide meals and free time activities to needy children in Hungary using the Erzsébet voucher, which was then under consideration in Parliament.[77]

144. On 4 July 2011, Claimants received the "*First Data, Prepaid Card Issuing and POS acquiring*

(IV. 12.) on the Rules of Issuance and Use of the Széchenyi Recreational Card (15 December 2011) **[R-0018]**; Szatmáry Statement, § 27 **[RWS-2]**.

71 RfA §§ 32, 38; R-I §§ 69, 78; Decree No. 55/2011 **[C-0073]** / **[RLA-0091]**; PIT Law as amended in 2011, effective 1 January 2012 [hereinafter "2011 PIT Law"] **[C-0074]** / **[RLA-0088]**; Adam Viktor, *Cafeteria - What a Great Business to Issue Vouchers!,* Napi Online (11 June 2009) **[RLA-0128]**.

72 R-I §§ 67, 231; R-II § 63; SZÉP Card Proposal, 12 – 13, 17, 29 **[R-0008]**; Szatmáry Statement, §§ 29 – 43 **[RWS-2]**.

73 R-II § 63; SZÉP Card Proposal, 12 – 13, 17, 29 **[R-0008]**.

74 CPHB-I § 56; C-II §§ 25 – 69.

75 C-I § 157; Respondent press release, "Agreement on National Holiday Fund" (25 May 2011) **[C-0082]**.

76 Sample CD Hungary vouchers **[C-0041]**.

77 Speech No. 211/324 by Dr. Bence Rétvári (Plenary Session of Parliament) (2 July 2011) **[R-0052]**.

Services indicative proposal for Le Chèque Déjeuner Hungary."[78]

145. On 18 July 2011, the "*Proposal on the Modification of Government Decree 55/2011 (IV.12) on the rules of issuance and usage of the SZÉP Card*" was issued.[79]

146. In September 2011, a proposal re-conceptualized the SZÉP Card as an electronic wallet with different pockets – each subject to different tax-exemption caps: hotel and accommodation services (HUF 225,000 per year), restaurant services (HUF 150,000 per year); and other leisure and recreational services (HUF 75,000 per year).[80] According to Claimants, the SZÉP Card's ability to be used for hot meals made it a direct competitor with CD Hungary's meal vouchers.[81]

147. In September 2011, CD Hungary, through AETR, attempted to participate in the preparation of the draft of the 2011 Reform.[82] During the last two weeks of September 2011, AETR met on four occasions to discuss the proposed 2011 Reform.[83]

148. On 22 September 2011, CD Hungary expressed concerns about the proposed 2011 Reform to the Hungarian Embassy in France.[84] The French government intervened on 22 September 2011.[85]

149. On 30 September 2011, Claimants, Sodexo, and Edenred filed a complaint with the EC alleging that the proposed 2011 Reform violated the TFEU and the European Services Directive.[86]

150. On 7 October 2011, Respondent replied to the French Government's intervention of 22 September

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78 First Data, "Prepaid Card Issuingand [sic] POS Acquiring Services – Indicative Proposal for Le Chèque Déjeuner Hungary" (4 July 2011) **[C-0135]**; First Data, *Prepaid Card Issuing and POS Acquiring Services Indicative* Proposal (4 July 2011) **[R-0011]**.

79 Proposal on the modification of government decree 55/2011 (IV.12) on the rules of issuance and usage of Széchenyi Recreational Card (18 July 2011) **[R-0012]**.

80 R-I § 72; Proposal for the Government on the reform of the system of fringe benefits (September 2011) **[R-0015]**.

81 C-I § 144; 2011 PIT Law **[C-0074]** / **[RLA-0088]**.

82 RfA § 54.

83 C-I § 170; AETR meeting minutes (15 September 2011) **[C-0092]**; AETR meeting minutes (22 September 2011) **[C-0094]**; AETR meeting minutes (26 September 2011) **[C-0095]**; AETR meeting minutes (29 September 2011) **[C-0096]**.

84 RfA § 54; Letter from French ambassador to Hungary, Mr. Roudaut, to Mr. Szatmáry, Secretary of State for the Domestic Economy, dated 22 September 2011 **[RfA Exhibit C-18] / [C-0101].**

85 *Id*.

86 C-I §§ 176, 191; R-I § 88, R-II § 89, Note to the EC regarding possible changes affecting the regime of meal vouchers in Hungary (30 September 2011) **[R-0014]**; EC memo, "November infringements package: main decisions" (21 November 2012) **[C-0116]**.

2011, stating that the criteria for issuing the SZÉP Card would not be changed.[87]

151. On 11 October 2011, Respondent received a 100+ page proposal related to the 2011 Reform. According to Respondent, that document explained that the purpose of the proposal was to decrease public debt and accelerate economic growth and competitiveness.[88] The proposal stated that then-issuers of vouchers were not able to qualify to issue SZÉP Cards.[89]

152. On 14 October 2011, the bill proposing the 2011 Reform was introduced.[90]

153. On 18 October 2011, AETR wrote to the Ambassador of Hungary to France expressing a wish to be a part of the reform of the fringe benefit system.[91] Mediators were engaged to help AETR and Hungary reach an agreement. The mediators issued a report on 28 October 2011.[92]

154. On 23 November 2011, President Sarkozy of France – upon AETR's request – wrote to Prime Minister Orbán to express concerns about the proposed reforms.[93]

155. On 29 November 2011, IR 2011 Law amended law XCVII/1995 ("2011 PIT Law").[94] This law created the new meal voucher, the Erzsébet voucher, which would be issued exclusively by MNUA.[95] Respondent explains that the Erzsébet voucher was established pursuant to a larger plan – the Erzsébet Program – which was introduced by the KIM. The Erzsébet Program would

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87 Letter from Mr. Kristóf Szatmáry (Secretary of State for the National Economy, Hungary), to Mr. René Roudaut (French ambassador to Hungary) (7 October 2011) **[Exhibit C-0102]**.

88 R-II § 64.

89 *Id.*, at § 69.

90 *Id.*, at § 90; Dr. György Matolscy, T/4662 Draft Bill on the Amendment of Certain Tax Acts and Other Related Acts (14 October 2011) **[R-0054]**.

91 Letter from the members of the AETR (Mr. Bálint Bessenyey, SodexoPass Hungária Kft., Mr. Pierre Gagnoud, Edenred Magyarország Kft. and Ms. Márta Nagy, Le Chèque Déjeuner Kft.), to Mr. László Trócsány (Ambassador of Hungary to France) (18 October 2012) **[C-0115]**.

92 Letter to Prime Minister Viktor Orbán from President Nicolas Sarkozy (23 November 2011) **[R-0017]**.

93 *Id.*; R-I § 89; Letter from Mr. Nicolas Sarkozy (President of the French Republic), to Mr. Viktor Orbán (Prime Minister of Hungary) (23 November 2011) **[C-0103]**; Press release, *The SZEP Card, Is It Going to be the First in the Class or Will it Suffer Failure in its First Year?*, AETR **[RLA-0125]**.

94 RfA § 36; C-I §§ 156, 382; 2011 PIT Law **[RfA Exhibit CLA-3]** / **[C-0074]** / **[RLA-0088]**.

95 RfA §§ 36 – 41; C-I §§ 156 – 158; 2011 PIT Law **[RfA Exhibit CLA-3]** / **[C-0074]** / **[RLA-0088]**; Respondent press release, "Agreement on National Holiday Fund" (25 May 2011) **[C-0082]**; Respondent press release, "The Government Launches Social Holidays Programme" (12 January 2012) **[C-0083]**; Decree No. 39/2011 (XII.29.) of the KIM on the issuance of the Erzsébet voucher (29 December 2011) **[C-0084]**; MTI (Hungarian Press Agency), "Decision about the new 'eats tickets' + video" (6 January 2012) **[C-0085]**; Law CVX of 2013 on the amendment of certain acts on economic matters (21 June 2013) **[C-0086]**.

serve the two goals of (1) improving health and nutrition of disadvantaged Hungarians, and (2) funding social welfare programs that would be defunded after 2011, when the Holiday Vouchers would be discontinued.[96] Claimants allege that the SZÉP Card and the Erzsébet voucher were designed and implemented as a "*package*" which, together with the 2011 PIT Law, are referred to as the "2011 Reform."[97]

156. The 2011 Reform required Issuers of the SZÉP Card to meet five requirements, that they:

- have existed for at least five years before they begin issuing SZÉP Cards;
- be associated with a mutual insurance fund and provide services related to its activity;
- have issued at least 100,000 cash-substitute payment cards at the end of the last financial year preceding the request to issue the SZÉP Card;
- have premises open to the public in every Hungarian city with more than 35,000 inhabitants; and
- have at least two years' experience in the issuance of electronic vouchers as fringe benefits and more than 25,000 vouchers issued at the end of the last financial year.[98]

157. In addition to these requirements, Claimants state that a company seeking to meet these requirements could not use other service providers within its group of companies to meet the requirements of (1) having premises in every city of more than 35,000 inhabitants, (2) having at least 100,000 bank cards issued at the end of the last financial year, or (3) having 2 years of experience in the field of electronic vouchers under Section 71 of the PIT.[99]

158. The Parties dispute whether "Non-Hungarian Issuers" (defined as Sodexo, Edenred, and

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[96] R-I §§ 80 – 84; Central European University, *Cost of Living* (Academic Year 2015/16) **[R-0037]**; Erzsébet Program, *Civil Society Partners* **[R-0040]**; Erzsébet Program, *Erzsébet Program description* **[R-0041]**; Erzsébet Program, *In Numbers* **[R-0042]**; Eurostat: Statistics Explained, *File: People at risk of poverty or social exclusion, by age group, 2013* **[R-0043]**; Szatmáry Statement, §§ 44 – 46 **[RWS-2]**; Europe 2020 Website, http://ec.europa.eu/euroe2020/index_en.htm.

[97] CPHB-I § 1.

[98] RfA § 32; C-I § 145; R-I § 75; Decree No. 55/2011, § 13 **[RfA Exhibit CLA-2]**/ **[C-0073]**; Act XCVI of 1993 on Voluntary Mutual Insurance Funds, 6 December 1993, § 2(2)d **[C-0075]**; 2011 PIT Law, § 71(a)(cb) **[C-0074]** / **[RLA-0088]**.

[99] C-I § 145; Act IV of 2006 on Business associations, 4 January 2006, §§ 1, 2(1), 55(1), 55(3), 64(1) (4 December 2006) **[C-0076]**; Act CXXXII of 1997 on Hungarian Branch Offices and Commercial Representative Offices of Foreign Registered Companies, 2 December 1997, § 2b) (2 December 1997) **[C-0077]**; Action brought on 10 April 2014 – *European Commission v. Hungary*, Case C-179/14, Official Journal 2014 C 202 (30 June 2014) **[C-0078]**.

Claimants,[100] who Claimants state held almost 100% of the market share for fringe benefit vouchers not including vacation vouchers as of 2011[101]) could meet the requirements to issue SZÉP Cards. According to Claimants, none of the Non-Hungarian Issuers could meet the criteria and only OTP Bank, MKB Nyugdipenztart es Egeszsegpenztart Kiszolgalo Kft (subsidiary of MKB Bank Zrt.), and K&H Cszoportzolgaltato Kft (subsidiary of K&H Bank Zrt.) became SZÉP Card Issuers.[102] Respondent states that the three issuers of SZÉP Cards were not Hungarian-owned: MKB was owned solely the German Bayerische Landesbank from 2010 – 2014, K&H Bank was and is owned by the Belgian KBC Bank N.V., and 62.5% of the shareholders in OTP Bank were foreign individuals, with foreign, institutional, corporate investors, and international development institutions holding 62.7% of the shares.[103] At the Hearing, Respondent noted that Ms. Nagy explained that Claimants were not interested in working with a bank because it would have impacted their profits and were not interested in issuing the SZÉP Card because the economics did not work.[104]

159. On 12 December 2011, Hungarian politicians issued statements about the rationale of the 2011 Reform, the creation of the SZÉP Card, and the creation of the Erzsébet voucher.[105] Dr. Bence Rétvári (State Secretary of the KIM) informed Parliament that the proposal would enable 100% of the profit related to the relevant voucher market to "*stay in Hungary and serve a public purpose, the social and child-based catering…*"[106] Mr. Miklós Soltész (Secretary of State at the PSZAF)

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[100] RfA § 18; C-I § 3.

[101] RfA § 22.

[102] RfA § 33; C-I § 176.

[103] R-I § 76; OTP Bank, Corporate Social Responsibility Report **[R-0019]**; Certificate of effective and non-effective company data for MKB Bank Zrt., accessed via the website of the Hungarian Ministry of Justice on (30 December 2014) **[R-0032]**; Certificate of effective and non-effective company data for KH Bank, accessed via the website of the Hungarian Ministry of Justice (30 December 2014) **[R-0033]**.

[104] Tr. Day 4 at 60 (R. Closing) (*citing* Tr. Day 2 at 32:15 – 21 (Nagy)).

[105] C-I §§ 206, 208 – 209, 269; C-II §§ 110 – 112; R-II § 260; Respondent press release, "The Government Launches Social Holidays Programme" (12 January 2012) **[C-0083]**; Dr. Bence Rétvári (State Secretary of the KIM), Speech at the Parliament No. 152/90 (12 December 2011) **[C-0119]** / **[R-0055]**; Mr. Miklós Soltész (Ministry of Natural Resources), Speech at the Parliament No. 152/161 (12 December 2011) **[C-0120]**; Mr. Miklós Soltész (Ministry of Natural Resources), Speech at the Parliament No. 152/165 (12 December 2011) **[C-0121]**.

[106] C-II § 110; Dr. Bence Rétvári (State Secretary of the KIM), Speech at the Parliament No. 152/90 (12 December 2011) **[C-0119]**.

stated that the profits would be used for children and their holidays, rather than being transferred from Respondent State.[107]

160. On 15 December 2011, there was a "*Proposal for the Government on the amendment of 55/2011 on the Rules of Issuance and Use of the* [SZÉP] *Card*."[108]

161. The 2011 Reform went into effect on 1 January 2012.[109] Following this, Claimants, Edenred, and Sodexo issued a joint press release stating that Hungary was excluding French companies from the meal voucher market.[110]

162. As of 1 January 2012, there were three tax rates applicable to all benefits: 0%, 30.94%, and 51.17%. The Parties dispute how the tax rates applied to individual voucher types. According to Respondent, in addition to the SZÉP Card and the Erzsébet voucher, other vouchers with no issuer restriction or requirement (including meal vouchers that could be redeemed at workplace canteens up to HUF 12,500/month) were subject to the 30.94% tax rate.[111] Beyond that, any issuer could continue to issue vouchers redeemable for hot or cold meals taxed at the preferential rate of 51.17%.[112] Claimants dispute this and argue that the preferential rate of 30.94% was only available for the SZÉP Card and the Erzsébet voucher and, thereby, excluded CD Hungary from the market.[113] Claimants state that the 2011 Reform reclassified their meal vouchers as "*specific defined benefits*" under Art. 70 of the PIT and subjected them to the tax of 51.17%.[114]

163. On 6 January 2012, Prime Minister Orbán responded to President Sarkozy's letter of 23 November 2011, noting his concerns but not commenting on the 2011 Reform.[115] French and Hungarian Foreign Ministers discussed the situation on 24 January 2012, and the French

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107 C-II §§ 111 – 112; Respondent press release, "The Government Launches Social Holidays Programme" (12 January 2012) **[C-0083]**; Mr. Miklós Soltész (Ministry of Natural Resources), Speech at the Parliament No. 152/165 (12 December 2011) **[C-0121]**.

108 Minister of National Economy, Proposal on the amendment of Government Decree 55/2011 (IV. 12.) on the Rules of Issuance and Use of the Széchenyi Recreational Card (15 December 2011) **[R-0018]**.

109 C-I § 381; R-I § 94.

110 Edenred, Sodexo, Chèque Déjeuner press release "Reform of the restaurant voucher in Hungary" (2012) **[C-0071]**

111 R-II § 82; 2011 PIT Law **[C-0074]** / **[RLA-0088]**.

112 R-I §§ 85 – 86, 94 – 95; R-II § 83; Graphic adapted from Edenred website, available at http://edenred.hu/.

113 C-II § 106.

114 C-I § 162; *see also* CPHB-I Annex No. 6, first table; 2011 PIT Law, Art. 70 **[C-0074]** / **[RLA-0088]**.

115 C-I § 175; Letter from Mr. Viktor Orbán (Prime Minister of Hungary) to Mr. Nicolas Sarkozy (President of the French Republic) (6 January 2012) **[C-0107]**.

Government issued a press release regarding the negotiation efforts.[116]

164. By 30 January 2012, Claimants' business activity in Hungary was 10% of what it was the previous January.[117]

165. The SZÉP Card and Erzsébet voucher benefitted from a massive publicity campaign.[118] Claimants also state that 99% of CD Hungary's public sector clients admitted that they had been pressured to choose the Erzsébet voucher and had, therefore, stopped using CD Hungary's vouchers.[119] Respondent states, however, that Claimants have stated in other *fora* that 32% of their customers were lost for reasons unrelated to the 2011 Reform.[120]

166. On 6 March 2012, Ms. Nagy – representing AETR – attended a meeting with Mr. Szatmáry.[121]

167. On 27 March 2012, Claimants held the Hungarian Branch Strategic Meeting to discuss CD Hungary's future, in light of the pending economic conditions.[122]

168. On 6 April 2012, the French Ministry of Foreign Affairs announced that the Hungarian Ambassador had been summoned to the Quai d'Orsay to discuss the 2011 Reform.[123]

169. On 13 April 2012, AETR members met with Mr. Guller and discussed three possible solutions to

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[116] C-I § 178; French Government press release, meeting between Mr. Alain Juppé (Minister of State for Foreign Affairs, France) and Mr. János Martonyi (Minister of State for Foreign Affairs, Hungary) (24 January 2012) **[C-0108]**.

[117] LCD, Extracts from the meeting minutes of the Board of Directors dated 17 October 1996, 22 November 2011, and 30 January 2012 **[C-0045]**.

[118] C-I §§ 164 – 166; Respondent press release, "Common Communication Campaign for the Success of the Szép Card" (16 December 2011) **[C-0079]**; Nemzeti Üdülési Szolgálat Kft., Company registry excerpt (11 April 2012) **[C-0088]**; Photos of the Erzsébet advertising campaign **[C-0089]**; Népszava, "Meal vouchers become a political weapon" (27 January 2012) **[C-0090]**; Patrik Andó, "Hundreds of Millions for Promotion Purposes", Világgazsdaság (12 March 2012) **[C-0091]**.

[119] C-I § 202; Dér Statement, § 49 **[CWS-1]**; First Nagy Statement, § 54 **[CWS-2]**.

[120] R-II §§ 76, 78, 300; Extract from Claimants' internal presentation (27 March 2012) **[C-0124]**; Legrand Statement, §§ 35 – 37, 40 **[CWS-3]**; Presentation, Hungarian Branch Strategic Meeting, Le Chèque Déjeuner (27 March 2012) **[R-0056]** / **[NAV-0066]**.

[121] C-I § 179; Minutes of the meeting between Mr. Kristóf Szatmáry (Secretary of State for the National Economy), and Ms. Márta Nagy (6 March 2012) **[C-0080]** / **[R-0021]**; First Nagy Statement, §§ 50, 55, 56 **[CWS-2]**.

[122] Legrand Statement, §§ 35 – 36 **[CWS-3]**; Extract from Claimants' internal presentation (27 March 2012) **[C-0124]**.

[123] French Government press release, "Hungary – Bilateral Economic Relations: Summoning of Ambassador of Hungary to France" (6 April 2012) **[C-0109]**; Letter from Edenred, Sodexo and Chèque Déjeuner to Mr. Michel Barnier (European Commissioner, Internal Market and Services) (6 April 2012) **[C-0164]**.

the difficulties created by the 2011 Reform. Other anticipated attendees, including representatives from the Government, representatives responsible for the SZÉP Card, MNUA, and Social Partners, were absent.[124]

170. In June 2012, LCD (now UP) implemented an initial redundancy plan for 40 of its employees.[125]

171. On 21 June 2012, the EC initiated an infringement procedure against Respondent.[126]

172. On 28 August 2012, there were negotiations between Claimants (through AETR) and Respondent.[127]

173. In November 2012, the 2011 Reform was amended.[128]

174. On 21 November 2012, the EC issued a reasoned opinion against Hungary, finding that the measures constituted a breach of the TFEU and the Services Directive (2006/123/EC).[129]

175. In January 2013, after the IR 2011 Law amendments from November 2012 took effect, LCD (now UP) began taking steps to discontinue voucher activities in Hungary.[130] On 7 February 2013, Claimants announced that CD Hungary had ceased to issue vouchers.[131] CD Hungary terminated its agreements with companies accepting vouchers effective 31 May 2013.[132] CD Hungary

[124] C-II §§ 132, 134; Email from Mr. Pierre Gagnoud (Edenred) to Mr. Bálint Bessenyey (Sodexo) and Ms. Márta Nagy (16 April 2012) **[C-0154]**; Notes of the meeting (2 April 2012) **[C-0167]**.

[125] RfA § 49; C-I § 219; R-II § 76; Agreement between CD Hungary and employee representatives (19 June 2012) **[RfA Exhibit C-14]** / **[C-0125]**; First Nagy Statement, § 61 **[CWS-2]**; Legrand Statement, §§ 35 – 37, 40 **[CWS-3]**.

[126] RfA § 62; EC press release dated 20 June 2013 "Internal market – the Commission has brought Hungary before the Court of Justice to contest restrictive conditions on the issue of luncheon vouchers and other benefits in kind" **[RfA Exhibit C-24]**.

[127] C-I § 185; C-II § 135; Minutes of the meeting between the Non-Hungarian Issuers and Respondent, 3, 5, 7, 8 (28 August 2012) **[C-0112]**.

[128] RfA § 68.

[129] RfA § 62; C-I § 191; EC press release dated 20 June 2013 "Internal market – the Commission has brought Hungary before the Court of Justice to contest restrictive conditions on the issue of luncheon vouchers and other benefits in kind" **[RfA Exhibit C-24]**; Zoltán Simon, "Hungary on Path to Shed Junk Grade and Shield Forint, Orbán Says", *Bloomberg* (15 December 2014) **[C-0016]**.

[130] RfA §§ 68, 72; C-I §§ 221, 226; Agreement between CD Hungary and employee representatives, 7 February 2013 **[RfA Exhibit C-26]**; Legrand Statement, § 39 **[CWS-3]**.

[131] C-II § 136; Claimants' press release, "Groupe Chèque Déjeuner stops issuing vouchers in Hungary" (7 February 2013) **[C-0037]**.

[132] RfA §§ 14, 73, 115; C-I §§ 142, 228; R-II §§ 76, 79; Claimants' press release, "Groupe Chèque Déjeuner stops issuing vouchers in Hungary" (7 February 2013) **[RfA Exhibit C-27]** / **[C-0037]**; Sample CD Hungary (termination letter of network agreement) (4 February 2013) **[C-0128]**; Sample CD Hungary (termination letter

commenced further employee layoffs.[133] As of 30 June 2013, CD Hungary ceased reimbursing vouchers.[134]

176. On 20 June 2013, the EC announced that it would refer the Hungarian fringe benefits matter to the CJEU.[135]

177. On 26 July 2013, Mr. Mihály Varga (Minister of the National Economy) replied to Mr. Landriot's (Claimants' then-CEO) 19 April 2013 letter, on behalf of Respondent.[136]

178. In September 2013, Claimants state that CD Hungary closed its office in Budapest.[137] Respondent, however, states that CD Hungary continued to have financial activity in Hungary in 2014.[138]

179. From September – November 2013, Claimants attempted to negotiate a settlement with

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of employer agreement) (4 February 2013) **[C-0129]**; Legrand Statement, §§ 35 – 37, 40 **[CWS-3]**; Collection of Network Agreement Termination Letters (4 February 2013) **[R-0060]**.

133 Agreement between CD Hungary and the employee representatives (7 February 2013) **[C-0127]**.

134 C-I § 229; First Nagy Statement, § 65 **[CWS-2]**.

135 RfA § 64; C-I § 192; EC press release dated 20 June 2013 "Internal market – the Commission has brought Hungary before the Court of Justice to contest restrictive conditions on the issue of luncheon vouchers and other benefits in kind" **[RfA Exhibit C-24]**; *Judgment of the Court (First Chamber) of 6 November 2012 — European Commission v. Hungary,* Case C-286/12, Official Journal C 9/35 (1 December 2013) **[C-0017]**; Letter from Mr. Jacques Landriot (CEO, Le Chèque Déjeuner CCR, Legal representative of the President, CD Internationale), to Mr. Mihály Varga (Minister of the National Economy), copied to Mr. Viktor Orbán (Prime Minister of Hungary), Mr. Tibor Navracsics (Vice-Prime Minister and Minister of State Administration and of Justice) (23 September 2013) **[C-0040]**; Written question K/11769 (Dr. Garai István Levente, Parliamentary Deputy, MSZP) and written response NGM/19787/2013 (Mr. Mihály Varga, Minister of the National Economy) (12 and 29 July 2013) **[C-0081]**.

136 C-I § 234; R-II § 150; Letter from Mr. Mihály Varga (Minister of the National Economy) to Mr. Jacques Landriot (CEO, Le Chèque Déjeuner CCR, Legal representative of the President, CD Internationale) (26 July 2013) **[C-0130]**; Letter from Mr. Mihály Varga (Minister of the National Economy) to Mr. Jacques Landriot (CEO, Le Chèque Déjeuner CCR, Legal representative of the President, CD Internationale) (26 July 2013) **[R-0025]**.

137 C-I § 229; First Nagy Statement, § 65 **[CWS-2]**.

138 R-II § 87; Le Chèque Déjeuner Financial Statement (2014) **[R-0061]**; Certificate of Incorporation for CD Hungary (28 June 2016) **[R-0062]**; Legrand Statement, § 40 **[CWS-3]**.

Respondent.[139] Claimants commenced these ICSID proceedings in December 2013.[140]

180. In February 2014, Erzsébet Utalványforgalmazó carried out a test purchase with one of its contractual partners, "*Csaba Kassai*." This test showed irregularities and Erzsébet Utalványforgalmazó informed the partner that such irregularities would be cause for termination of the contract.[141] In April 2014, the Hungarian Trade Licensing Office issued a summary on the experiences related to compliance with Decree No. 55/2011 on the rule of the issuance and use of the SZÉP Card.[142] According to Claimants, audits conducted by the Trade Licensing Office suggest that misuse of SZÉP Cards is widespread.[143]

181. On 10 April 2014, the EC brought its action, *EC v. Hungary*, Case C-179/14, seeking a declaration that Hungary has infringed the Services Directive by adopting and maintaining in force the SZÉP Card system governed by Decree No. 55/2011, to the CJEU.[144]

182. In September 2014, the European Large Families Confederation gave Hungary an award as an acknowledgement for the Erzsébet Program.[145] By October 2014, the SZÉP Card system was used by over 1 million employees and 58,000 affiliates.[146]

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[139] C-I §§ 235 – 238; Letter from Mr. Jacques Landriot (CEO, Le Chèque Déjeuner CCR, Legal representative of the President, CD Internationale), to Mr. Mihály Varga (Minister of the National Economy), copied to Mr. Viktor Orbán (Prime Minister of Hungary), Mr. Tibor Navracsics (Vice-Prime Minister and Minister of State Administration and of Justice) (23 September 2013) **[C-0040]**; Email exchange between Dr. Zoltán Guller (Commissioner for the Ministry of State Administration), Ms. S. Trouillard (Assistant to Mr. Jacques Landriot), and Mr. Jacques Landriot (CEO, Legal representative of the President of CD Internationale) (October 2013) **[C-0131]**; Email exchange between Dr. Zoltán Guller (Commissioner for the Ministry of State Administration), Ms. S. Trouillard (Assistant to Mr. Jacques Landriot), and Mr. Jacques Landriot (CEO, Legal representative of the President of CD Internationale) (11, 24, 24, 29 October 2013) **[R-0027]**.

[140] C-I § 239; R-I § 91.

[141] Letter to Csaba Kassai from Erzsébet Utalványforgalmazó Zrt. Word doc title: Translation_Test Purchase **[R-0028]**.

[142] Hungarian Trade Licensing Office, Summary on the experiences of the control conducted in the fourth quarter of 2014 in connection with the examination on the compliance of the regulations of Government Decree 55/2011. (IV.12.) on the rules of the issuance and use of the Széchenyi Recreational Card (April 2014) **[R-0029]**.

[143] C-II § 117; Hungarian Trade Authority (MKEH), 2015 3rd quarter inspection report (2015) **[C-0161]**; Hungarian Trade Authority (MKEH), 2015 4th quarter inspection report (2015) **[C-0162]**.

[144] Action brought on 10 April 2014 – *European Commission v. Hungary*, Case C-179/14, Official Journal 2014 C 202 (30 June 2014) **[C-0078]**.

[145] European Large Families Confederation, *ELFAC Prize 2014* **[R-0030]**.

[146] R-I § 96; Ministry for National Economy, *Széchenyi Recreation Card system: a Good Practice from Hungary to boost domestic tourism* (October 2014) **[R-0031]**.

183. On 17 September 2015, the Advocate General issued an opinion in *EC v. Hungary*.[147]

184. On 23 February 2016, the CJEU found that the 2011 Reform was discriminatory, unjustified, and disproportionate. All four of the complaints brought by the EC in relation to the SZÉP Card and the complaint regarding the Erzsébet voucher were upheld.[148]

185. Respondent states that, beginning in mid-2016, Hungary began revising the PIT to remove preferential tax treatment for the Erzsébet vouchers as of 1 January 2017.[149] According to Respondent, from that date forward, the Erzsébet voucher would be taxed at the same rate as hot or cold meal vouchers (49.98%). Respondent is also revising the criteria to qualify as a SZÉP Card Issuer.[150]

B. Factual Assertions in Response to Tribunal Questions

186. The following summaries are based on the Parties' responses, in their post-hearing briefs, to the Tribunal's questions contained in PO-10.

1. Tribunal Question (f) Regarding the Applicable Tax Rates

> *f) Having regard to paragraphs 82 and 83 of the Respondent's Rejoinder, the Parties are asked to elaborate on the tax rate applicable to Claimants' meal vouchers before and after the 2011 changes.*

(a) Claimants' Arguments

187. Prior to the 2011 Reform, Claimants' hot and cold meal vouchers were subject to a tax rate of 19.04%, and this rate applied to benefits valued up to an exemption ceiling of HUF 18,000 per employee. Following the 2011 Reform, Claimants' cold and hot meal vouchers were subject to

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[147] *European Commission v. Hungary*, European Court of Justice, Case C-179/14, Opinion of Advocate General Yves Bot (17 September 2015) **[C-0168]**.

[148] C-II §§ 138 – 140; *European Commission v. Hungary*, European Court of Justice, Case C-179/14, Judgment of the Court (Grand Chamber) (23 February 2016) [hereinafter "*EC v. Hungary*, CJEU Judgment"] **[C-0153]**; *European Commission v. Hungary*, European Court of Justice, Case C-179/14, Opinion of Advocate General Yves Bot (17 September 2015) **[C-0168]**.

[149] R-II §§ 94; 326; Act CXXXI of 2010 on Participation of the Public in the Preparation of Legislation **[RLA-0191]**.

[150] R-II § 94.

a tax rate of 51.17%, and there was no exemption ceiling.[151]

188. After the 2011 Reform, the SZÉP Card and the Erzsébet voucher were given a more advantageous rate than the one applicable to Claimants' vouchers, with the 30.94% rate applying to the SZÉP Card and the Erzsébet voucher and the 51.17% rate applying to Claimants' vouchers.[152] This difference was confirmed in the *Edenred* Award.[153]

189. Claimants argue that it is irrelevant that CD Hungary could theoretically compete with the SZÉP Card and the Erzsébet voucher on equal terms above the exemption limit, as no company would purchase vouchers above the exemption ceiling.[154]

(b) Respondent's Arguments

190. In 2011, hot and cold meal fringe benefits were available below HUF 18,000 at an effective tax rate of 19.04%. Above HUF 18,000, these benefits were taxed at an effective tax rate of 51.57%. In 2012, hot and cold meal fringe benefits were taxed at an effective rate of 51.17%.[155] Although the tax exemption granted to the SZÉP Card and the Erzsébet voucher is 20% less that that applied to the hot and cold meal vouchers, that did not make Claimants' vouchers 20% more expensive. Indeed, in 2013 when Claimants left the market, Claimants' hot meal voucher was USD 8.76 more expensive than an SZÉP Card of the same value (11.4%) and its cold meal voucher was only USD 5.60 more expensive (also, 11.4%). This difference was only relevant up to the exemption cap.[156]

191. The comparison of tax treatment of hot and cold meal fringe benefits in 2011 versus 2012 offers little relevant information to the Tribunal. The tax treatment of all fringe benefits changed yearly, and the tax treatment of a particular fringe benefit in one year had no bearing on the tax treatment in another year.[157] Ms. Nagy's testimony, which suggested that the 2011 Reforms exhausted an internal budget held by CD Hungary's customers, was unsound and ignored the fact that CD Hungary's customers were companies to whom CD Hungary had no right and with whom they

151 CPHB-I § 19; Claimants' Opening, slide 3.

152 CPHB-I §§ 20 – 23; Respondent's Appendix to Closing, 26; Tr. Day 4 at 8:20 – 11:4 (Claimants' Closing).

153 CPHB-I § 23; *Edenred* Award, § 364.

154 CPHB-I § 24; Tr. Day 2 at 21:14 – 22:3 (Nagy).

155 RPHB-I § 60; R-II Table 1: Overview of the Fringe Benefit System as of 1 January 2012.

156 RPHB-I §§ 61 – 62; Table 3; Table 4; Tr. Day 2 at 17:23, 66:23 – 24; 67:4 – 7 (Nagy).

157 RPHB-I §§ 63.

had no long-term commitment. If Claimants' theory is accurate, CD Hungary would have had to convince clients (pre-existing clients who renewed and clients taken from competitors) every year to spend up to the new yearly tax code, regardless of the amount spent in the prior year, as part of their expected business activity.[158] Claimants' assumption that conditions would remain unchanged from 2011 onwards is arbitrary and serves to stabilize the legal framework – and that is a condition that neither Claimants nor Hungary contracted for.[159]

(c) The Tribunal's Considerations

192. The Parties agree that in 2011, prior to the 2011 Reform, hot and cold meal fringe benefits were available below HUF 18,000 at an effective tax rate of 19.04% and above HUF 18,000 at an effective tax rate of 51.57%. The Parties also agree that, after the 2011 Reform and beginning in 2012, vouchers to provide hot and cold meal fringe benefits were taxed at an effective rate of 51.17%. The SZÉP Card and the Erzsébet voucher could be used for the purchase of hot and cold meal fringe benefits, up to the exemption limit of HUF 12,500 and HUF 5,000 per month, respectively.[160] The SZÉP Card and the Erzsébet voucher had a tax rate of 30.94%, up to the exemption limit of HUF 12,500 and 5,000 per month, respectively.[161]

2. Tribunal Question (h) Regarding Evidence Anticipating Changes to the Meal Fringe Benefit System in 2011

> *h) The Parties are requested to bring together, and supplement as appropriate, their respective submissions addressing the evidence, or lack thereof, anticipating the changes to the meal fringe benefit system in 2011.*

(a) Claimants' Arguments

193. When Claimants made their decision to invest in Hungary, there was no way that Claimants could have anticipated that Respondent would make discriminatory and unreasonable regulatory changes in the future. Thus, there can be no evidence that the 2011 Reform could have been

[158] RPHB-I § 64; Table 6 in response to Question (i); Tr. Day 1 at 198:14 – 17, 199:24 – 200:2 (Nagy); Tr. Day 2 at 40:2 – 20 (Gans and Guller); PIT Law, in force as of 1 January 2013, § 70(4) **[RLA-0189]**.

[159] RPHB-I § 65; Tr. Day 3 at 88:13 – 17 (Gans and Nicholson) (*confirming* that Nicholson modeled the continuation of the 2011 legislative conditions); *Id*. at 119:12 – 13 (Nicholson).

[160] CPHB-I § 19 (Table); RPHB-I n. 118.

[161] *Compare* CPHB-I § 19 (Table) and R-II § 81 (Table 1).

anticipated.[162]

194. While it is undisputed that the market was moving toward dematerialization, the meal voucher market was not ready for dematerialization prior to the 2011 Reform.[163] Indeed, Edenred's electronic voucher failed in 2009, confirming that the market was not ready for dematerialization.[164] Further, the Erzsébet voucher was launched as a paper voucher rather than as a card because the market was not ready for dematerialization in 2011.[165] This paper-based Erzsébet voucher gained a larger share of the market than did the SZÉP Card, in spite of that card's advantages, thereby confirming that the market simply was not ready for electronic cards.[166]

195. There was no reason, over the period from 2007 – 2011, to believe that the government would take regulatory measures encouraging or mandating dematerialization and there are no draft bills or internal papers in the record showing that Respondent considered taking such measures prior to the 2011 Reform.[167] Exhibit NAV-58 only mentions the view of a person seeking to promote electronic vouchers, that there is a political will supporting the issuance of cards.[168] Exhibit C-0062 reports only CD Hungary's assumption that the government planned a changeover as of 2010 for all types of benefits in kind.[169] As Ms. Nagy explained, even if the Government thought to implement legislation, nothing happened between 2007 and 2012.[170] FTI also testified that a prospective buyer looking at the situation in 2011 would have believed that a law mandating

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162 CPHB-I Annex No. 4 § 1.

163 CPHB-I Annex No. 4 n.1; Tr. Day 3 at 89:14 – 90:5 (Nicholson) (*explaining* that the market was moving toward dematerialization); *see also* Tr. Day 1 at 66:20 – 67:15 (Claimants' Opening) (*stating* that dematerialization was not imminent on 1 January 2012); Tr. Day 4 at 13:22 – 16:18 (Claimants' Closing) (while dematerialization would occur, as of 2011 there was no reason to anticipate an imminent shift to dematerialization).

164 Tr. Day 3 at 195:2 – 24 (Navigant).

165 Tr. Day 3 at 23:10 – 13, 30:19 – 31:3(Guller); *see also* Tr. Day 3 at 201:14-16 (Navigant) (*confirming* that the market was not ready for dematerialization as of the valuation date).

166 CPHB-I §§ 97 – 98; Tr. Day 2 at 65:23 – 25, 66:1 – 67:1 (Nagy) (*explaining* why Claimants would not offer electronic card); Tr. Day 3 at 101:4 – 102:6 (FTI) (*confirming* that Hungary was not prepared for dematerialization).

167 CPHB-I §§ 230 – 233, Annex No. 4; Tr. Day 3 at 62:11 – 17; 77:7-15; 80:2-24 (Nagy).

168 CD Hungary Internal Memo, Hungary Card Issuance, 7 July 2011 **[NAV-58]**.

169 Extract from Internal CD Hungary presentation (22 June 2009), slide 23 **[C-0062]**.

170 Tr. Day 2 at 56:19 – 21 (Nagy).

dematerialization was not going to be passed within the next five years.[171]

196. CD Hungary's decision not to issue an electronic voucher was prudent and legitimate from a business perspective.[172] While Claimants knew since 2006 that electronic vouchers were a future potential business, Claimants regularly monitored the market[173] and noted that those companies who tried to issue electronic vouchers were unsuccessful.[174] In the circumstances, especially where there was a low level of POS terminals in the country,[175] issuing an electronic voucher when there was no reason to do so would have jeopardized CD Hungary's profitability.[176]

197. Even if CD Hungary had issued an electronic voucher, CD Hungary would be in no better position since it would not have been permitted to qualify as a SZÉP Card Issuer.[177] Further, issuing electronic vouchers did not prevent another company, Edenred, from being evicted from the voucher market by the 2011 Reform.[178]

(b) Respondent's Arguments

198. Changes to the legislative framework were not a speculative or unknown risk, but were instead predictable and certain. Claimants were aware that the PIT was amended annually and that there was always a possibility of the abolishment or elimination of all fringe benefits.[179] All

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[171] Tr. Day 3 at 99 – 102 (FTI); Tr. Day 4 at 16:19 – 18:4 (C. Closing).

[172] CPHB-I § 94; Tr. Day 2 at 18:23 – 24 (Nagy); Tr. Day 4 at 18:16 – 20:9 (C. Closing); Summary table, "Le Chèque Déjeuner Kft. 1997-2012" **[C-0057]**.

[173] *See e.g.*, Extract from Internal CD Hungary presentation (22 June 2009) **[C-0062]**; Extract from Internal CD Hungary presentation (2009) **[C-0065]**; First Data, "Prepaid Card Issuingand [sic] POS Acquiring Services – Indicative Proposal for Le Chèque Déjeuner Hungary" (4 July 2011) **[C-0135]**; Presentation, Benefits of the Card System, Le Chèque Déjeuner (17 June 2011) **[R-0051] / [NAV-59]**.

[174] *See e.g.,* Tr. Day 2 at 61:20 – 22 (Nagy).

[175] National Bank of Hungary, "The payment card business in Hungary", 2008 2 **[FTI-02]**.

[176] Tr. Day 2 at 65:23 – 25; 66:1-4 (Nagy).

[177] *Id*., at 51:16 – 17 (Nagy).

[178] *Edenred* Award, at §§ 405, 686 – 689.

[179] *See e.g.*, Letter from Ms. Márta Nagy to Mr. Philippe Baudry (Economic and Commercial Counsellor, French Embassy, Budapest) together with annexes (30 March 2000) **[C-0051]** (*noting* difficulties in the system in Hungary that fringe benefits are considered "*as a matter of tax policy*"); Extract from Mazars Summary Notes on CD Hungary, "Le Chèque Déjeuner Kft., Hungary", dated 31 December 2009, 31 December 2010, and 31 December 2011 – 31 December 2013 **[C-0044]** (*discussing* the legislative changes from 2009 – 2013); Dr. Péter Oszkó, T/9817 Draft Bill on the Amendment Amending the Transformation of Tax System (May 2009) **[R-0048]** (in 2009, the Government considered the abolishment of the Fringe Benefit System by "*significantly reducing tax advantages, tax exemptions, and by eliminating certain taxes and contributions*"); Proposal from the AETR concerning the universal regulation of the system for allocating benefits in kind (January 2010) **[C-0145]** (AETR's proposition to reform to improve the Fringe Benefit System by introducing stronger

participants in the system anticipated these annual changes and governed themselves in accordance with the constantly evolving legislative framework. For Claimants, their success depended on clients re-signing contracts depending on the mix of products that would be available that year. Every year, Claimants waited until November to design and determine what their business activity was likely to look like the following year.[180]

199. As Claimants were aware, the 2008 economic crisis caused significant hardship in Hungary and required dramatic changes to the Fringe Benefit System. The Reform 2009 and the Reform 2010, which imposed taxation on fringe benefits and eliminated certain fringe benefits – including cold meal and gift vouchers – caused, in Claimants' words, the ground to shift. Claimants were, thus, on notice that Respondent was facing difficult fiscal constraints and was concerned about the loss of tax revenues in the inefficient Fringe Benefit System.[181] Claimants even anticipated the abolishment of cold meal vouchers,[182] the impending shift to electronic cards, and the possibility that the Government might use legislation to accelerate that transition.[183]

200. The 2011 Reform was considered long before they were put into force.[184] Claimants were aware of the proposed content of the amendments contained in the 2011 Reform as early as September

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regulation); Dér Statement, § 11 **[CWS-1]** and First Nagy Statement, § 11 **[CWS-2]** (Claimants' product mix changed and depended on the tax framework of the relevant year).

[180] RPHB-I § 87; Tr. Day 4 at 55:17 – 24 (R. Closing); Dér Statement, §§ 19 – 20 **[CWS-1]**, Tr. 212:9 - 213:7 (Gans and Nagy).

[181] RPHB-I § 88; C-I § 136 ("*ground shifted*").

[182] First Nagy Statement, § 37 **[CWS-2]**.

[183] *See e.g.,* Extract from Internal CD Hungary presentation (31 October 2006) **[C-0043]** (*describing* "*hot vouchers in the form of a card*" among "*threats*", such as the card issued by Pannot Tikett); Internal CD Hungary memorandum, "Outline of situation – cards on the Hungarian market" (18 July 2007) **[C-0134]** (*describing* market players and government entities considering the transition to cards and how to respond); Extract from Internal CD Hungary presentation (22 June 2009) **[C-0062]** (*noting* competition from issuers with electronic vouchers); Extract from Internal CD Hungary presentation (2009) **[C-0065]** (explicitly mentioning Card Issuers as new competitors); First Nagy Statement, § 41 **[CWS-2]** (in 2009, LCD – now UP – considered the introduction of a card as a potential area of future growth); Dér Statement, § 41 **[CWS-1]** (*demonstrating* awareness that electronic cards may be introduced); Legrand Statement, § 27 **[CWS-3]** ("*if card-based vouchers turned out to be a real threat, we would be in a position to respond within a year*"); Benefits of the card system, flyer dated 17 June 2011 **[NAV-0059]** (flyer prepared by CD Hungary detailing the advantages of electronic cards over traditional paper); First Data, "Prepaid Card Issuingand [sic] POS Acquiring Services – Indicative Proposal for Le Chèque Déjeuner Hungary" (4 July 2011) **[C-0135]** (LCD commissioned First Data to provide an offer regarding the facilitation of LCD's shift to electronic cards); CD Hungary Internal Memo, Hungary Card Issuance, 7 July 2011 **[NAV-0058]** (*discussing* new voucher issuers introducing cards in Hungary and warning that LCD "*cannot afford not to have our own strategy in this market*").

[184] RPHB-I § 86.

2011.[185] Although Claimants were not entitled to prior notice, and certainly not to better notice than received by other stakeholders, Claimants responded to the publicly available draft law by (1) developing and launching a media campaign criticizing the content of the reforms, (2) lobbying for diplomatic intervention, (3) filing a pre-emptive complaint with the EC, (4) drafting and circulating a white paper containing remarks on the reforms and additional proposals, and (5) organizing more than 20 meetings with Government officials and other voucher issuers.[186]

(c) The Tribunal's Considerations

201. In response to the Tribunal's request[187] Claimants prepared a table showing when France raised these issues with Hungary. **To summarize**: Once CD Hungary and the other French issuers discovered the draft proposal on the amendments to the PIT law, they sought to negotiate changes to the proposed legislation and, through AETR, obtained the French Government's support to convince Respondent to change its plans. The French government intervened on 22 September 2011.[188] In response, on 7 October 2011, Respondent State replied that the criteria for issuing the SZÉP Card would not be changed.[189] On 23 November 2011, President Sarkozy wrote to Prime Minister Orbán to again express his concern.[190] On 6 January 2012, after the 2011 Reform entered into force, Prime Minister Orbán responded to President Sarkozy's letter, without commenting

[185] Proposal for the Government on the reform of the system of fringe benefits (September 2011) **[R-0015]**; AETR meeting minutes (15 September 2011) **[C-0092]**; AETR meeting minutes (22 September 2011) **[C-0094]**; AETR meeting minutes (26 September 2011) **[C-0095]**; AETR meeting minutes (29 September 2011) **[C-0096]**; First Nagy Statement, § 50 **[CWS-2]**; C-I § 169.

[186] RPHB-I § 89; AETR press release (4 October 2011) **[C-0099]** and AETR press release, "The SZEP Card, is it going to be the first in the class or will it suffer failure in its first year?" (November 2011) **[C-0100]** (*describing* Claimants' media campaign criticizing the reforms); *see e.g.*, Summary table, "Interviews and action taken Hungary September 2011" (12 January 2012) **[C-0098]**, Letter from Mr. Kristóf Szatmáry (Secretary of State for the National Economy, Hungary), to Mr. René Roudaut (French ambassador to Hungary) (7 October 2011) **[C-0102]**; Letter from Mr. Nicolas Sarkozy (President of the French Republic), to Mr. Viktor Orbán (Prime Minister of Hungary) (23 November 2011) **[C-0103]** (*evidencing* diplomatic intervention); Letter from the members of the AETR (Mr. Bálint Bessenyey, SodexoPass Hungária Kft., Mr. Pierre Gagnoud, Edenred Magyarország Kft. and Ms. Márta Nagy, Le Chèque Déjeuner Kft.), to Mr. László Trócsány (Ambassador of Hungary to France) (18 October 2012) **[C-0115]**; Letters from AETR together with Resolution and Proposal (10 November 2011) **[C-0165]** (organization of white Paper and reforms).

[187] Tr. Day 4 at 96:2-23.

[188] Letter from Mr. René Roudaut (French ambassador to Hungary), to Mr. Kristóf Szatmáry (Secretary of State for the National Economy, Hungary) (22 September 2011) **[C-0101]**.

[189] Letter from Mr. Kristóf Szatmáry (Secretary of State for the National Economy, Hungary), to Mr. René Roudaut (French ambassador to Hungary) (7 October 2011) **[C-0102]**.

[190] Letter from Mr. Nicolas Sarkozy (President of the French Republic), to Mr. Viktor Orbán (Prime Minister of Hungary) (23 November 2011) **[C-0103]**.

on the 2011 Reform.[191] Thereafter, on 24 January 2012, the French Government issued a press release regarding negotiation efforts.[192] The French Government issued a second press release on 6 April 2012 announcing that the Hungarian ambassador had been summoned in regard to legislative amendments affecting French businesses, especially in the meal voucher sector.[193]

3. Tribunal Question (i) Regarding Tax Rates on Wages / Salaries vs. Fringe Benefits

i) What was the tax rate on wage / salary payments, as opposed to fringe benefits, during the periods addressed in these proceedings?

(a) Claimants' Arguments

202. Claimants argue that the comparison between meal vouchers and salaries is irrelevant because there is no market for meal vouchers above the exemption ceiling. Thus, even if CD Hungary's voucher still had a preferential tax over salaries, it does not change the fact that the SZÉP Card and the Erzsébet voucher had a preferential tax over CD Hungary's vouchers.[194]

(b) Respondent's Arguments

203. The entire market of fringe benefits is, and has always been, predicated on tax incentives – *i.e.*, preferential tax rates are applied to fringe benefits as compared to those applicable to salary.[195] The annual PIT contained a list of fringe benefits that could be enjoyed by Hungarian employees at a reduced rate.[196] Considering the 2011 Reforms, it is important to note that (1) the fact that a particular fringe benefit enjoyed preferential tax treatment in one year was no guarantee that it would exist in the next year, (2) it could not be assumed that fringe benefits would enjoy the same or increasingly preferential tax rates and exemption limits as the year before because (3)

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[191] Letter from Mr. Viktor Orbán (Prime Minister of Hungary) to Mr. Nicolas Sarkozy (President of the French Republic) (6 January 2012) **[C-0107]**.

[192] French Government press release, meeting between Mr. Alain Juppé (Minister of State for Foreign Affairs, France) and Mr. János Martonyi (Minister of State for Foreign Affairs, Hungary) (24 January 2012) **[C-0108]**.

[193] French Government press release, "Hungary – Bilateral Economic Relations: Summoning of Ambassador of Hungary to France" (6 April 2012) **[C-0109]**.

[194] CPHB-I Annex No. 5.

[195] RPHB-I § 90; Legrand Statement, § 12 **[CWS-3]**; Tr. Day 1 at 209:7 – 210:4 (Nagy) (*noting* that without the cash advantage, CD Hungary could not exist).

[196] RPHB-I § 91; R. Opening Statement, slide 5.

Government priorities change.[197] The 2011 Reform were not focused on Claimants or any other particular issuer. They impacted a variety of fringe benefits.[198] The 2011 Reforms did not eliminate hot and cold meal fringe benefits, which continued to receive a significant tax advantage as compared to salary, and these benefits received the same tax rate as applied to the Erzsébet voucher and the SZÉP Card above their respective exemption limits. The 2011 Reforms removed the exemption limits for hot and cold meal vouchers, thus enabling employers to purchase Claimants' vouchers in an unlimited amount, if they so desired.[199]

204. At the Hearing, Respondent explained that, although the SZÉP Card can be used to purchase hot meals and the Erzsébet voucher was initially introduced as a cold meal opportunity but could not be used for hot meals, neither is an identical replacement of the pre-existing vouchers, which were retained in the system. Rather, they are less expensive due in part to restricted commissions. They also offer better security.[200]

(c) The Tribunal's Considerations

205. In response to the Tribunal's question, the Parties provided detailed tables with their submissions. They show the requested tax rates as they applied to a wide variety of vouchers. The Parties appear to agree on the "*effective tax up to the limit*" for hot meal and cold meal vouchers from 2008 – 2011, but their numbers diverge from 2012 onwards. Insofar as considered necessary for its reasoning, the Tribunal will address the information provided in the Tables later in this Award.

VI. JURISDICTION OF THE TRIBUNAL

A. THE DECISION ON PRELIMINARY ISSUES OF JURISDICTION

206. In its Decision on Preliminary Issues of Jurisdiction of 3 March 2016, the Tribunal decided:

> *i. The Respondent's objections against the Tribunal's jurisdiction regarding the claims for alleged breach of Article 3 of the Treaty between Hungary and France are dismissed.*
>
> *ii. The Tribunal has jurisdiction over all the claims raised.*

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[197] RPHB-I § 92.

[198] *Id*., at § 93; R. Closing Presentation, slide 6.

[199] RPHB-I § 94.

[200] Tr. at 58:1-10 (R. Closing).

iii. *The decision on costs is reserved for a later stage of the procedure.*[201]

B. THE PARTIES' SUBMISSIONS REGARDING THE *ACHMEA* DECISION

207. The following summaries are based on the Parties' responses to Question (a) regarding the relevance of the *Achmea* Case[202], Respondent's letter of 6 March 2018, and the Tribunal's invitation for submissions following the 6 March 2018 *Achmea* Decision. The CJEU's *Achmea* Decision was as follows:

> *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 Agreement on Encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, 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.*[203]

1. Claimants' Arguments

208. The *Achmea* Decision has no relevance for the present proceedings. There is no focus on EU law in this case and the Tribunal is only required to resolve a dispute under the BIT and the ICSID Convention. While the Tribunal may ultimately consider the *Achmea* Decision as fact (as Claimants argue) or as law, the Tribunal is not bound to apply it or to conclude that it robs the Tribunal of jurisdiction. This Tribunal is an international tribunal constituted under the ICSID convention and is, therefore, outside of the scope of the *Achmea* Decision.[204] Further, this arbitration is held outside the EU, is not seated within the EU, and is not governed by an EU of EU Member State *lex loci arbitri*. There is no local court within the EU that has jurisdiction over this arbitration, including in the case of a challenge to an award. This arbitration, therefore, does not and cannot infringe EU law, and there is no rule in EU law that provides an ICSID arbitration proceedings such as this would be inconsistent with EU law.

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201 Decision on Jurisdiction, § 228.

202 Following the Hearing in PO-10, the Tribunal invited the Parties to explain "*What relevance, if any, of the case* Slovak Republic v. Achmea *(Case-284-16) for the present case?*" in their post-hearing submissions.

203 *Achmea* Decision, CJEU (6 March 2018) [hereinafter "*Achmea* Decision"], at § 62.

204 Claimants' Second Comments on *Achmea* Decision (16 May 2018), at 3.

(a) Procedural Objections and Due Process

209. Claimants object to the timing of Respondent's objection, and its new argument that the alleged incompatibility between the TFEU and Art. 9(2) of the BIT has effect from 1 May 2004, when Respondent acceded to the EU. This is an argument that Respondent could have raised earlier and does not result from an analysis of the *Achmea* Decision.[205]

210. Respondent first raised a jurisdictional objection based on EU law in April 2017, after losing its case in *Edenred*. Prior to that, although the issue of potential incompatibility between EU law and intra-EU BITs already existed, and although Respondent knew of this objection and had raised it in other matters, Respondent never challenged or reserved its position as to the jurisdiction of the Tribunal on that ground in these proceedings.[206] Here, Respondent only raised an objection based on the scope of its consent.[207] This belated challenge to ICSID Jurisdiction based on EU law is nothing more than an attempt to withdraw consent, which is prohibited under the ICSID Convention.[208] Further, by its Decision on Jurisdiction, the Tribunal found that it had jurisdiction over all of the Claimants' claims. For the Tribunal to reconsider that Decision there would need to exist an exceptional circumstance involving some sort of fraud or egregious circumstance or manifest error of law.[209] None are present here.

(b) The Relevance of the *Achmea* Decision

211. The only issue before the Tribunal is whether and to what extent it should consider the *Achmea* Decision. Claimants' position is that the Tribunal can only consider this judgment as fact.[210] Given the Parties' agreement that EU law is not relevant to the dispute, and Claimants' reliance on Respondent's position that EU law is not to be and cannot be applied by the Tribunal to resolve the issues in this case, Respondent cannot now change its position to Claimants' detriment.

[205] Claimants' Second Comments on *Achmea* Decision (16 May 2018), at 4; CPHB-I § 285.

[206] Claimants' First Comments on *Achmea* Decision (18 April 2018), at 3, *citing Electrabel S.A. v. Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012 [hereinafter "*Electrabel v. Hungary*, Decision on Jurisdiction"] **[CLA-0070]**; *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010 [hereinafter "*AES v. Hungary*"] **[CLA-0062]**; Claimants' letter to the Tribunal (21 April 2017).

[207] Claimants' First Comments on *Achmea* Decision (18 April 2018), at 3.

[208] *Id*., at 4; CPHB-I §§ 294, 293 (*arguing* that since Art. 9 of the BIT is and will remain valid and applicable regardless of the outcome of the *Achmea* case, there is no need for the Tribunal to delay this arbitration pending the CJEU's judgment.)

[209] Claimants' First Comments on *Achmea* Decision (18 April 2018), at at 6, point five.

[210] *Id*. at 7; Claimants' Second Comments on *Achmea* Decision (16 May 2018), at 6.

Claimants expressly request that the Tribunal not apply EU law to resolve the dispute submitted to it.[211] For completeness, Claimants' position is that EU law does not form part of the rules and principles of international law that the Tribunal has to apply, pursuant to the BIT and the ICSID Convention. The EU legal order is based on a body of law that is distinct from international law. EU law binds its Member States but does not, at an international level, bind all subjects of international law, as does international public law.[212] The CJEU confirmed the autonomy of EU law in the *Achmea* Decision,[213] and reached its conclusion without reference to international law, rather than by reference to the national law of the two EU Member States and to the other treaties between them. The mere fact that EU law is rooted in international treaties does not make it part of the rules and principles of international law referred to in Art. 9 of the BIT.[214] Further, as noted by the Tribunal, and as Respondent agrees, decisions of other tribunals – including decisions of the CJEU – are not binding on the Tribunal.[215] Third, the Tribunal itself, and not the CJEU, must determine and exercise its own jurisdiction on the basis of Art. 25(1) of the ICSID Convention and Art. 9 of the BIT, which are fully valid and applicable instruments governed by international law.[216] Article 9 of the BIT contained a valid offer to arbitrate that has been accepted by Claimants. For the purposes of this case, this consent has become irrevocable.[217]

212. Here, the EU is not a party to the BIT, and none of Claimants' claims is based on EU law. None of the ECT cases relied on by Respondent is relevant because the EU is a party to the ECT alongside the Member States and third-party States.[218] Further, in those cases, at least one of the parties relied on EU law in the merits. The *Wirtgen* case is also irrelevant, as in that case the tribunal had to determine the applicable law and one party argued that EU law was part of the rules of law applicable to the dispute.[219]

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211 Claimants' First Comments on *Achmea* Decision (18 April 2018), at 8.

212 *Id*.

213 *Id*. at 9; *Achmea* Decision, § 33.

214 Claimants' First Comments on *Achmea* Decision (18 April 2018), at 9.

215 CPHB-I § 287; Decision on Preliminary Issues of Jurisdiction § 208; Tr. Day 4 at 85: 21 – 22 (R. Closing).

216 CPBH-I § 288; Decision on Preliminary Issues of Jurisdiction § 136.

217 CPHB-I § 288; Christoph H. Schreuer, Loretta Malintoppi, August Reinisch & Anthony Sinclair, *The ICSID Convention: A Commentary*, 2nd Edition, Cambridge University Press, 2009, Art. 25, §§ 596 – 599 **[CLA-0239]**.

218 Claimants' First Comments on *Achmea* Decision (18 April 2018), at 9.

219 *Id*., at 10.

213. As argued by Hungary in *Electrabel*, the operative part of a CJEU judgment, like the *Achmea* Decision, must be understood in light of the reasoning on which it was based.[220] If the Tribunal considers the *Achmea* Decision as part of the applicable international law under the BIT, the Tribunal must conclude that, contrary to Respondent's allegations, the *Achmea* Decision does not apply to (1) all dispute settlement provisions in all intra-EU BITs, (2) Art. 9(2) of the BIT, or (3) ICSID arbitration.[221]

214. Here, Respondent seeks to broaden the scope of the *Achmea* Decision by its analysis of the words "*such as*" and "*may be called to interpret and apply EU law*."[222] In the *Achmea* Decision, and consistent with the purpose of preliminary references as an opportunity to expound authoritatively on points of EU law to ensure its coherence, the CJEU deliberately used restrictive language, rather than terms like "*any*."[223] *Achmea* cannot be extended to all and any dispute settlement provisions in intra-EU BITs.[224] An important difference between the present matter and the *Achmea* case is that this matter engages ICSID proceedings, whereas *Achmea* concerned an UNCITRAL arbitration with a seat localized in an EU Member State. The *Achmea* Decision concerned Art. 8 of the Netherlands-Slovakia BIT (which does not contain an option for ICSID Arbitration) or to dispute settlement provisions of the same kind.[225]

215. In the *Achmea* Decision, the CJEU specifically made reference to the potential risk of interpretation or application of EU law by the arbitral tribunal and it specifically referred to the applicable law provisions of Art. 8 of the Netherlands-Slovakia BIT and to the internal law of Slovakia and the EU treaties. By contrast and contrary to what Respondent now suggests, there is no risk that the Tribunal may be called to interpret or apply any substantive rule of EU law. It is undisputed that (1) Claimants' claims are not based on EU law, but are based on the BIT, (2) Respondent does not attack EU law or the Commission Decision of 22 November 2012 or the CJEU Decision of 23 February 2016 that rules that Hungary had infringed EU law, and (3) the Tribunal is only called upon to resolve the specific dispute before it, under the BIT.[226] Respondent

[220] Claimants' Second Comments on *Achmea* Decision (16 May 2018), at 6; *Electrabel v. Hungary*, Decision on Jurisdiction, §§ 6.84 and 6.85 **[CLA-0070]**.

[221] Claimants' Second Comments on *Achmea* Decision (16 May 2018), at 6; CPHB-I § 289.

[222] *Id*., at 7.

[223] *Id*.

[224] *Id*., at 8.

[225] Claimants' First Comments on *Achmea* Decision (18 April 2018), at 4; *see also* CPHB-I §§ 285 – 286.

[226] Claimants' Second Comments on *Achmea* Decision (16 May 2018), at 8 – 9.

has repeatedly stated that EU law has no relevance to the present dispute and that EU law must be distinguished from the BIT.[227] There is no reason to distinguish between jurisdiction and the merits: Respondent's position on the lack of relevance of EU law must apply equally to whether the Tribunal is examining jurisdiction or the merits.[228]

216. Respondent's analogy to the *Diallo* case is irrelevant for four reasons. First, Respondent has not demonstrated the broad scope of the *Achmea* Decision, and it can be expected that further preliminary requests by national courts will be necessary to understand the *Achmea* Decision. Second, the parties in *Diallo* were both States, not a private investor and a State. Third, Respondent cites *Diallo* for the position that "*when decisions of interpretative bodies are binding upon the parties to a dispute, they should also bind the tribunal before which the two parties appear*" and that this requires that application of the *Achmea* Decision in the present case, even if it is not binding on the Tribunal. Unlike the comparison in *Diallo*, where one party relied on a treaty, neither Party in this case has relied on the TFEU to support the merits of the case. Fourth, in *Diallo*, the ICJ insisted on the necessity to protect legal security. If anything, the requirement of legal security would be on Claimants' side in the present case.[229]

217. Even if the Tribunal considers that it is bound to apply the *Achmea* Decision, that it has broad scope, and that there is a fundamental conflict between Art. 9(2) of the BIT and the TFEU (all of which Claimants deny), the Tribunal would still have jurisdiction based on the principle of *lex specialis*.[230] The BIT provided special procedural protection in the form of investment protection against the host State and constitutes an exception to the general rule of the relationship envisioned in the EU treaties and is, therefore, *lex specialis* in comparison with the EU treaties. Similarly, the ICSID Convention is *lex specialis* with respect to the procedural protection in comparison with the BIT which refers to it.[231] Most general international law may be derogated in application of the *lex specialis* rule and it is only in exceptional circumstances that the application of this principle is precluded,[232] such as in situations of conflicting *jus cogens* or

[227] Claimants' First Comments on *Achmea* Decision (18 April 2018), at 5; *citing* R-II § 91.

[228] Claimants' First Comments on *Achmea* Decision (18 April 2018), at 6.

[229] Claimants' Second Comments on *Achmea* Decision (16 May 2018), at 10.

[230] *Id*., at 10 – 11; CPHB-I § 291; Patrick Daillier, Mathias Forteau and Alain Pellet, *Droit International Public*, L.G.D.J.-Lextenso, 2009, § 173 **[CLA-0246]**; *Blusun S.A., Jean Pierre Lecorcier and Michael Stein v. The Italian Republic*, ICSID Case No. ARB/14/3, Award (27 December 2016) [hereinafter "*Blusun v. Italy*"], § 290 **[CLA-0247]**.

[231] Claimants' First Comments on *Achmea* Decision (18 April 2018), at 14 – 15.

[232] Claimants' Second Comments on *Achmea* Decision (16 May 2018), at 10 – 11.

human rights norms.[233] EU law does not qualify as *jus cogens* or as human rights norms, and the ILC Report does not suggest so.[234] In the hierarchy analysis between *lex superior* and *lex specialis*, the ILC Report concludes that *lex specialis* prevails.[235] Noting in the present case prevents the application of the *lex specialis* rule and, by virtue of this rule, the BIT and the ICSID Convention – being *lex specialis* – must prevail over EU law.[236]

218. The other provisions of the VCLT do not allow the Tribunal to decide that Art. 9 of the BIT is no longer in force. The BIT and the TFEU do not relate to the same subject matter, and this renders Art. 59(1)(b) of the VCLT (implicit termination of an earlier treaty by a subsequent one) and Art. 30(3) of the VCLT (inapplicability of incompatible provisions in the earlier treaty) inapplicable.[237] The *lex posterior* rule of Art. 30 of the VCLT does not apply because neither requirement – (1) the existence of a fundamental incompatibility between provisions of two successively ratified treaties, or (2) that the two rules in conflict have the same subject matter – is fulfilled.[238] Respondent has failed to demonstrate that a fundamental or material incompatibility exists between Art. 9(2) of the BIT and the TFEU.[239] The *Achmea* Decision is

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[233] "Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law", Report of the Study Group of the International Law Commission, 13 April 2006, at § 108 available at: http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf.

[234] *Id*., at § 374.

[235] *Id*., at § 412.

[236] Claimants' Second Comments on *Achmea* Decision (16 May 2018), at 11; Claimants' First Comments on *Achmea* Decision (18 April 2018), at 15.

[237] CPHB-I § 291; VCLT Art. 59(1)(b) and Art. 30(3) **[CLA-0240]**; *Eureko B.V. v. The Slovak Republic*, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension (26 October 2010) [hereinafter "*Eureko* PCA case"], § 187 **[CLA-0245]**; for tribunals finding that BITs and TFEU law do not have the same subject matter, *see e.g., Anglia Auto Accessories Limited v. The Czech Republic*, SCC Case No. V 2014/181, Award (10 March 2017) [hereinafter "*Anglia v. Czech Republic*"], §§ 115 – 116 **[CLA-0241]**; *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Decision on Jurisdiction (30 April 2010) [hereinafter "*Oostergetel v. Slovakia*"], § 104 **[CLA-0242]**; *European American Investment Bank AG v. The Slovak Republic*, PCA Case No. 2010-17, Award on Jurisdiction (22 October 2012) [hereinafter "*EAIB v. Slovakia*"], §§ 184 – 280 **[CLA-0243]** / **[RLA-0259]**; *WNC Factoring Ltd v. The Czech Republic*, PCA Case No. 2014-34, Award (22 February 2017) [hereinafter "*WNC v. Czech Republic*"] §§ 295 – 308 **[CLA-0244]**; *Eastern Sugar, B.V. v. Czech Republic*, UNCITRAL, SCC Case No. 088/2004, Partial Award (27 March 2007) [hereinafter "*Eastern Sugar v. Czech Republic*"], § 180 **[RLA-0154]**; *see also* Tr. Day 4 at 86:11-15 (R. Closing) (*admitting* that the protections are not identical).

[238] Claimants' Second Comments on *Achmea* Decision (16 May 2018), at 12-13; Claimants' First Comments on *Achmea* Decision (18 April 2018), at 15, 16; CPHB-I § 291; VCLT Art. 59(1)(b) and Art. 30(3) **[CLA-0240]**; *Eureko* PCA case, § 187 **[CLA-0245]**; for tribunals finding that BITs and TFEU law do not have the same subject matter, *see e.g., Anglia v. Czech Republic,* §§ 115 – 116 **[CLA-0241]**; *Oostergetel v. Slovakia*, § 104 **[CLA-0242]**; *EAIB v. Slovakia*, §§ 184 – 280 **[CLA-0243]** / **[RLA-0259]**; *WNC v. Czech Republic*, §§ 295 – 308 **[CLA-0244]**; *Eastern Sugar v. Czech Republic*, § 180 **[RLA-0154]**; *see also* Tr. Day 4 at 86:11-15 (R. Closing) (*admitting* that the protections are not identical).

[239] Claimants' Second Comments on *Achmea* Decision (16 May 2018), at 13.

silent on the issue of fundamental or material incompatibility and instead only referred to "*potential*" incompatibility between Art. 8 of the Netherlands-Slovakia BIT and the TFEU. Article 8 of the Netherlands-Slovakia BIT, however, is substantially different from Art. 9 of the BIT, and such an analysis based on the former does not *ipso facto* apply to the latter.[240] EU law does not provide investors with the important procedural right of access to independent international arbitration. Further, the BIT and the TFEU do not have the same subject matter.[241] Thus, the Tribunal should reject Respondent's theory based on the *lex posterior* rule under Art. 30 of the VCLT, which is not applicable here.[242]

219. There is no *lex superior* primacy of EU law in international law. As Respondent argued in *Electrabel*, Art. 351 of the TFEU "*is aimed solely at respecting pre-existing obligations to non-Member States and is inapplicable in an intra-EU dispute*."[243] Claimants' procedural rights of access to ICSID arbitration and the obligations of Respondent under the ICSID Convention are not affected by provisions of the TFEU or the *Achmea* Decision.[244] Article 351 of the TFEU recognizes the validity and applicability of earlier treaties with third parties, such as the ICSID Convention. Article 351 of the TFEU is not a *lex superior* rule under international law – it is merely a conflict of law rule. The ILC Report states that in relation to conflict of law clauses, those cannot affect the rights of third parties to the treaty containing the conflict of law rule. The European Court of Human Rights confirms that international courts will refuse to give effect to arguments based on the alleged supremacy of EU law.[245] While Art. 351 of the TFEU may govern the rights and obligations of EU Member States *vis-à-vis* one another in their *inter se* agreements, the analysis is different from the perspective of international law where third parties are involved. Here, giving effect to Art. 351 of the TFEU (or a rule of EU law) to deny a third party's rights under a separate treaty would be contrary to the settled rule of international law that a State cannot evade its international obligations on grounds of its internal law. Thus, the Tribunal should find

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[240] *Id*., at 13; Claimants' First Comments on *Achmea* Decision (18 April 2018), at 16.

[241] Claimants' Second Comments on *Achmea* Decision (16 May 2018), at 13 – 14; Claimants' First Comments on *Achmea* Decision (18 April 2018), at 16 – 17; RPHB para 29; Tr. Day 4 at 86:11 – 15 (R. Closing).

[242] Claimants' Second Comments on *Achmea* Decision (16 May 2018), at 14.

[243] *Electrabel v. Hungary*, Decision on Jurisdiction, § 4.79 **[CLA-0070]** ("Response: *In the Respondent's Response of 1 August 2011, as regards Article 307 EC, the Respondent re-states its previous case, according to which 'Article 307 is aimed solely at respecting pre-existing obligations to non-Member States and is inapplicable in an intra-EU dispute'* (…)"; *see also* § 4.178: "(…) *Both Parties submit that Article 307 EC is inapplicable to the present case; but the Tribunal does not consider that Article 307 can so easily be dismissed*.").

[244] Claimants' First Comments on *Achmea* Decision (18 April 2018), at 15.

[245] Claimants' Second Comments on *Achmea* Decision (16 May 2018), at 16.

that rules of EU law cannot deprive the Claimants of their right to resort to arbitration under the BIT and the ICSID Convention. Further, pursuant to Art. 27 of the VCLT , Respondent cannot invoke EU law to excuse its breaches of the BIT. EU law is part of the "*internal law*" of all Member States, for purposes of Art. 27 of the VCLT. Thus, Respondent's reliance on the *Achmea* Decision to escape its international responsibility under the ICSID Convention and the BIT is precluded by settled principles of international law concerning the application of treaties.

220. Although the EC has initiated infringement proceedings against some Member States with intra-EU BITs, and some are in the process of terminating theirs, Respondent has not terminated or sought to terminate its BITs pursuant to Art. 12 of the BIT.[246] This confirms both that (1) the BIT remains valid, and (2) it is for the EC and the EU Member States to take the appropriate actions. It is not for the Tribunal to simply decline or refrain from exercising jurisdiction. It is Respondent's responsibility to denounce the BIT if it considers this necessary, and to date it has not done so.[247]

221. The BIT was not terminated in 2004 and, therefore, Respondent's consent to ICSID jurisdiction was not withdrawn.[248] Even if the BIT was retroactively terminated as of 1 May 2004, the BIT – including Art. 9(2) – would remain in force for a period of 20 years as a result of the "*survival clause*" contained in Art. 12(2) of the BIT. Claimants, thus, would benefit from the protection offered under the BIT until 2024.[249] Further, Respondent did not denounce the ICSID Convention in 2004 – or ever – and cannot claim to benefit from the effects of a denunciation of the ICSID Convention.[250] Denunciation of the ICSID Convention is governed by Arts. 71 and 72 thereof, and leaves unaffected the consent previously perfected. It cannot have the effect of retroactively withdrawing consent.[251] Finally, the *Achmea* Decision does not support Respondent's argument that its offer to arbitrate and, consequently, its consent, was withdrawn retroactively. The *Achmea* Decision said nothing about its effect on perfected consent to arbitration between an EU national and an EU Member State under Art. 25 of the ICSID Convention, and this silence serves as further evidence of the limited scope of the judgment, which does not apply to ICSID arbitration. Thus,

[246] Claimants' First Comments on *Achmea* Decision (18 April 2018), at 6.

[247] *Id*., at 7.

[248] Claimants' Second Comments on *Achmea* Decision (16 May 2018), at 18.

[249] *Id*.

[250] *Id*., at 18 – 19; CPHB-I § 290. Given France's position, a mutual termination of the BIT under Art. 54(b) of the VCLT is unlikely. *See* CPHB-I § 290; Art. 54(b) of the VCLT **[CLA-0240]**.

[251] Claimants' Second Comments on *Achmea* Decision (16 May 2018), at 19.

Art. 25 of the ICSID Convention applies and Respondent's consent remains valid, which means that the Tribunal has jurisdiction under the Convention.[252]

(c) Whether Restraint from Jurisdiction Results in Denial of Justice

222. If the Tribunal declines or refrains from exercising jurisdiction, it would deprive the BIT of any effect, as the substantive rights contained in the BIT become ineffective without access to international arbitration.[253] This would result in a denial of justice for Claimants. Pursuant to Art. 26 of the ICSID Convention, Claimants have lost the right to seek relief elsewhere.[254] The present forum is the only one competent to hear the dispute under the BIT.[255] Arbitration is the only mechanism provided in the BIT for the settlement of expropriation claims. Respondent has not shown that there is any other international and neutral forum in which an investor may bring a direct action against an EU Member State for damages suffered as a result of a breach of a BIT.[256] The value of arbitration and the avoidance of the use of domestic courts is undeniable as a matter of principle.[257] Respondent has not shown that Claimants would even have standing to bring their claims before Hungarian domestic courts. Even with standing, however, Claimants' claims would be time-barred. Even so, bringing an action in domestic courts would be fundamentally inconsistent with the Tribunal's Decision on Jurisdiction, which considers that "*delocalized dispute settlement is at the very heart of the Treaty edifice concerning conditions of investment*."[258] While Respondent argues that domestic courts must be presumed to be neutral based on the principle of mutual trust, that presumption is inapplicable as it only binds Member States and not tribunals. The recognized effects of this vague principle are limited to (1) preventing courts of one Member State from evaluating the practice of courts of other Member States, and (2) the recognition of judgments from one Member State in the jurisdiction of all

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[252] *Id*.

[253] *Id*., at 20; Claimants' First Comments on *Achmea* Decision (18 April 2018), at 18 – 19.

[254] Claimants' First Comments on *Achmea* Decision (18 April 2018), at 19.

[255] *Id*., at 20; CPHB-I § 292; Tania Voon, Andrew Mitchell, James Munro, "Parting Ways: The Impact of Mutual Termination of Investment Treaties on Investor Rights", *ICSID Review*, Vol. 29, No. 2 (2014), 463 – 465 **[CLA-0249]**; *Blusun v. Italy*, §§ 289, 303 **[CLA-0247]**; *WNC v. Czech Republic*, § 307 **[CLA-0244]**; *Eastern Sugar v. Czech Republic*, § 180 [**RLA-0154]**.

[256] Claimants' First Comments on *Achmea* Decision (18 April 2018), at 20.

[257] *Id*.; C. Schreuer, "Interaction between International Tribunals and Domestic Courts", in *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers*, edited by A. Rovine (2010), 71, available at: http://www.univie.ac.at/intlaw/wordpress/pdf/interactions_int_tribunals_domestic.pdf; *WNC v. Czech Republic*, § 300 **[CLA-0244]**.

[258] Decision on Jurisdiction, 3 March 2016, §§ 144 and 194.

Member States, without the need for a special procedure.[259] In any event, the *Dan Cake* award, finding Hungary liable for denial of justice for the behavior of its courts, puts into question the neutrality and respect of fundamental rights in that country.[260]

223. What is at issue in the present matter is an alleged inapplicability of Respondent's consent to arbitration as the result of a CJEU decision that is not binding on the Tribunal. Even if *Germany v. Italy* were relevant by analogy, that case only states that judicial redress may be precluded for individuals by the effect of a norm of international law. Here, the norm on which Respondent relies has not been identified and such application cannot be "*in accordance with international law*." Thus, the *obiter dictum* in the ICJ's decision does not apply to the present case.[261]

224. When confronted with two sets of functions which are both valued by the international community, a balance must be struck between those two sets of functions, and the ICJ was criticized for its failure to do so in *Germany v. Italy*. Here, in addition to balancing competing norms of international law, the Tribunal must also balance the Parties' rights and interests. The finality of the ICSID system indeed strikes that necessary balance.[262] Here, what is at stake is Claimants' right to ICSID arbitration as the only effective means of obtaining judicial redress. Respondent's only stated interest is to avoid running afoul EU law through the enforcement of a future award. The balance weighs decisively in the Claimants' favor, as the consequences of the Tribunal's failure to exercise jurisdiction in this case would be dramatic and irreparable, and tantamount to a denial of justice.[263]

225. Respondent's contention that the Tribunal should decline or refrain from exercising jurisdiction in order "*to avoid fragmentation*" is unfounded and the consequences thus identified are speculative. First, there is no risk of fragmentation especially since the Parties have expressly

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[259] Claimants' Second Comments on *Achmea* Decision (16 May 2018), at 20 – 21; Claimants' First Comments on *Achmea* Decision (18 April 2018), at 20.

[260] Claimants' Second Comments on *Achmea* Decision (16 May 2018), at 21, Claimants' First Comments on *Achmea* Decision (18 April 2018), at 21.

[261] Claimants' Second Comments on *Achmea* Decision (16 May 2018), at 22.

[262] *Id*., at 23; *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction of 17 July 2003, § 28, available at: https://www.italaw.com/sites/default/files/case-documents/ita0183.pdf; *Ambiente Ufficio S.p.A. and others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility of 8 February 2013, available at: https://www.italaw.com/sites/default/files/case-documents/italaw1276.pdf; *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility of 4 August 2011, § 588, available at: https://www.italaw.com/sites/default/files/case-documents/ita0236.pdf.

[263] Claimants' First Comments on *Achmea* Decision (18 April 2018), at 22; Claimants' Second Comments on *Achmea* Decision (16 May 2018), at 23 – 24.

agreed not to apply EU law. Second, like the tribunal in the *Achmea* case, that found that "*the argument that Article 8 of the BIT is incompatible with EU law is [] unsustainable*",[264] other tribunals have consistently found no incompatibility between EU law and the relevant intra-EU BITs.[265] Third, issues of policy of a particular Member State are beyond the Tribunal's mandate.[266]

226. Issues related to the enforcement of the award to be issued cannot be an obstacle to jurisdiction, even when a tribunal considers that it has a duty to render an enforceable award.[267] Indeed, the ICSID system is not concerned with post-award issues, this being entirely governed by Arts. 53 and 54 of the ICSID Convention. The request that the Tribunal consider post-award issues in effect asks the Tribunal to go beyond its mandate and must be rejected. In any event, the award may be enforced outside the EU.[268]

(d) Application of the *Forum Prorogatum* Principle

227. Under the principle of *forum prorogatum*, which is accepted in ICSID arbitration, the jurisdiction of the tribunal can be extended by agreement of the parties in a case that would otherwise be outside of the tribunal's jurisdiction.[269] Such an agreement can be found in statements or conduct – beyond mere participation in proceedings – that involve an element of consent.[270] Here, there is such agreement: as recognized by the Tribunal in its Decision on Jurisdiction, Respondent has repeatedly expressed – through statements and conduct – its consent to resort to ICSID arbitration for the adjudication of claims based on the BIT.[271] By expressly choosing ICSID Arbitration, the Parties confirmed that they accepted that their dispute would be settled by a mechanism which is truly international: a delocalized arbitration, without a seat, detached from municipal legal

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264 *Achmea B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13 (formerly *Eureko B.V. v. The Slovak Republic*), Award (7 December 2012) [hereinafter "*Achmea v. Slovakia* Award"], §§ 277 – 283 **[CLA-0237]**.

265 Claimants' First Comments on *Achmea* Decision (18 April 2018), at 22.

266 *Id*., at 23.

267 Claimants' Second Comments on *Achmea* Decision (16 May 2018), at 24.

268 *Id*., at 25; Claimants' First Comments on *Achmea* Decision (18 April 2018), at 23 – 24.

269 Claimants' Second Comments on *Achmea* Decision (16 May 2018), at 25, 27; C. Schreuer, "Belated Jurisdictional Objections in ICSID Arbitration", *TDM* 1, 2010, 20, available at: http://www.univie.ac.at/intlaw/pdf/102_bel_jurisd_obj_icsid_arb.pdf.

270 Claimants' Second Comments on *Achmea* Decision (16 May 2018), at 26 – 27.

271 *Id*., at 28 – 29; Claimants' First Comments on *Achmea* Decision (18 April 2018), at 3-4; R-I § 16; Respondent's Post-Hearing Brief (Jurisdiction) § 3.

systems.[272] Once the offer to arbitrate was accepted, it became irrevocable, preventing Respondent from unilaterally withdrawing its consent and the Claimants from bringing claims elsewhere.[273] Thus, as may be necessary, a binding arbitration agreement separate from Art. 9 of the BIT was, therefore, also formed.[274]

228. Respondent's objection to the Tribunal's jurisdiction over Claimants' FET claims is not an obstacle to the Tribunal's jurisdiction over these claims under the *forum proragatum* principle because there the issue was not whether the Tribunal had jurisdiction. Rather, the issue was whether the scope of the Tribunal's jurisdiction, resulting from the consent of the Parties, could be extended to the FET claim by operation of Art. 4 of the BIT. Here, Respondent has confirmed that the alleged inapplicability of Art. 9(2) of the BIT leaves all other provisions of the BIT intact and effective. Since Respondent, thus, agrees that Art. 4 remains effective, it could serve as a basis on which the scope of the Tribunal's jurisdiction is extended to apply to the Claimants' FET claims.[275]

229. The principles of good faith, estoppel, and *venire contract factum proprium* all prevent Respondent from arguing that its consent to ICSID arbitration has been retroactively withdrawn.[276]

2. Respondent's Arguments

230. The issue before the CJEU in *Achmea* was the incompatibility of dispute resolution clauses contained in intra-EU BITs with EU law and their resultant inapplicability.[277] The *Achmea* Decision is applicable to these proceedings, as commenced pursuant to the BIT. As a consequence of the *Achmea* Decision, the Tribunal lacks jurisdiction. In the alternative, the Tribunal should decline exercising any jurisdiction over this matter. There are no procedural grounds that would justify the Tribunal disregarding the *Achmea* Decision.

[272] Claimants' First Comments on *Achmea* Decision (18 April 2018), at 4.

[273] Claimants' Second Comments on *Achmea* Decision (16 May 2018), at 28; Art. 26 of the ICSID Convention.

[274] Claimants' First Comments on *Achmea* Decision (18 April 2018), at 4; Claimants' Second Comments on *Achmea* Decision (16 May 2018), at 25.

[275] Claimants' Second Comments on *Achmea* Decision (16 May 2018), at 29.

[276] *Id*., at 29 – 30, Claimants' First Comments on *Achmea* Decision (18 April 2018), at 21.

[277] RPHB-I § 24; German Federal Court of Justice Decision in the Procedure for the Annulment of a Domestic Arbitral Award, Case No. I ZB 2/15 (3 March 2016) **[RLA-0262]**.

(a) Procedural Objections and Due Process

231. The *Achmea* Decision cannot be disregarded on procedural grounds. Respondent's jurisdictional objection based on this decision is not time-barred, and ICSID Arbitration Rule 41(1) is not coercive and does not negate each tribunal's obligation to determine any objection to its jurisdiction.[278] Further, tribunals have a duty to determine their jurisdiction, and to examine jurisdictional requirements *sua sponte*, if there are compelling reasons to do so.[279] The *Achmea* Decision serves as a compelling reason for this Tribunal to ascertain its jurisdiction *sua sponte*.[280]

(b) The Relevance of the *Achmea* Decision

232. The preliminary rulings of the CJEU – including the *Achmea* Decision – are (1) considered part of the *acquis communautaire*, (2) are binding in the same way as statutory law, (3) have *erga omnes* effect, extending the consequences of such rulings to all EU Member States and to private entities, like Claimants,[281] and (4) have retroactive effect.[282] This retroactive effect is part of the nature of preliminary rulings, which do not create new rules but rather clarify the meaning of pre-existing EU law "*as it must be or ought to have been understood and applied from the time of its coming into force*."[283] This is consistent with international law.[284] In the *Achmea* Decision, the CJEU concluded that international agreements that allow an investor from one Member State to arbitrate disputes against another Member State are incompatible with EU law because such agreements adversely affect the autonomy of EU law and are contrary to Arts. 267 and 344 of the

[278] Respondent's First Comments on *Achmea* Decision (28 March 2018), at 11; Christoph Schreuer, Loretta Malintopi, August Reinisch and Anthony Sinclair, The ICSID Convention: A Commentary, Art. 41, § 42 (2d ed. 2009).

[279] Respondent's First Comments on *Achmea* Decision (28 March 2018), at 12; *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility (24 September 2018), § 65.

[280] Respondent's First Comments on *Achmea* Decision (28 March 2018), at 13; Respondent's Second Comments on *Achmea* Decision (2 May 2018), at § 79.

[281] RPHB-I §§ 22 – 23; *Brasserie de Pêcheur and Factortame*, Joined Cases C-46/93 and C-48/93, CJEU Judgment (5 March 1996), ECLI:EU:C:1996:79 § 57 **[RLA-0253]**; *Flaminio Costa v. ENEL*, Case No. C-6/64, Judgment of the Court (15 July 1964), EU:C:1964:66 § 593 **[RLA-0260]**; Koen Lenaerts, Ignace Maselis and Kathleen Gutman, EU Procedural Law 246 (Janek Tomasz Nowak ed. 2014) **[RLA-0274]**.

[282] *Id*., *Amministrazione Delle Finanza dello Stato v. Denkavit Italiana S.R.I*., Joined cases C-283/94, C-291/94 and C-292/94, Judgment of the Court (Fifth Chamber) (17 October 1996), EU:C:1996:387 § 16 **[RLA-0251]**.

[283] Respondent's First Comments on *Achmea* Decision (28 March 2018), at 6.

[284] *Id*., at 6; Respondent's Second Comments on *Achmea* Decision (2 May 2018), at §§ 29 – 34.

TFEU.[285] Various aspects of the *Achmea* Decision affirm its broad application.[286] The referring court referenced the import and influence of its referral, noting its broad consequences given "*the numerous [BITs] still in force between Member States containing similar clauses*."[287]

233. The CJEU deliberately did not restrict its comments to the investment treaty there at issue, but rather established the incompatibility of Arts. 267 and 344 of the TFEU with any intra-EU BIT under which an investor may bring a claim against another Member State before an arbitral tribunal.[288] While there are differences between ICSID and UNCITRAL cases (where the possibility for a preliminary ruling exists during the annulment stage), the CJEU considered there to be insufficient guarantees for the uniform and consistent interpretation of EU law in investor-state arbitration. Accordingly, even an arbitration in the so-called self-contained ICSID regime would run afoul of EU law.[289]

234. Claimants' effort to impose an unduly restrictive interpretation of the terms "*such as*" is unavailing. This is reinforced by the CJEU's use of the words "*an*" international agreement "*such as*" the Netherlands-Slovakia BIT, as being only exemplative of the total category of intra-EU BITs giving rise to the conflict. The phrase "*such as Article 8 of the* [Netherlands-Slovakia BIT]" is preceded and followed by commas and, therefore, must be understood as being non-restrictive. The phrase could even be left out of the sentence. This is consistent with the purpose of preliminary references, which is to permit the CJEU to expound authoritatively on points of EU law, thereby ensuring the coherence of the same.[290]

235. Whether there is an actual risk that a tribunal will be asked to consider or interpret matters of EU law is not relevant. The inquiry is not whether a particular tribunal addressed a point of EU law but whether the dispute resolution clause might give rise to disputes where an arbitral tribunal might be called to do so. This renders the dispute resolution clause, but not the dispute itself, incompatible with EU law. In the investment treaty context, the CJEU reasoned that such risk was always present,[291] and it is acutely so in this case. Claimants sought to rely on Respondent's

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[285] Respondent's First Comments on *Achmea* Decision (28 March 2018), at 2.

[286] Respondent's Second Comments on *Achmea* Decision (2 May 2018), at § 1.

[287] *Achmea* Decision, § 14.

[288] Respondent's First Comments on *Achmea* Decision (28 March 2018), at 3 – 4.

[289] *Id*., at 4.

[290] Respondent's Second Comments on *Achmea* Decision (2 May 2018), at §§ 2 – 3.

[291] *Id*., at § 4.

alleged infringement of EU law to bolster their legal arguments on the merits and even went so far as to tie their legitimate expectations under Art. 3 of the BIT to the fact that Respondent would "*respect EU law and would not target European investors*."[292] Further, the questions asked by the Tribunal in the post-hearing briefs reveals the focus on EU law matters.[293] Thus, the risk that the Tribunal may be called upon to interpret issues of EU law cannot be dismissed.

236. The CJEU's interpretation of Arts. 267 and 344 of the TFEU is binding on a tribunal whose jurisdiction purports to be based on Art. 9(2) of the BIT.[294] As stated by the ICJ in *Diallo*, it is not possible to ignore the interpretative decisions issued by a specific body in charge of the interpretation of the treaty in question. Where such decisions are binding upon the parties to a dispute, they should also bind the tribunal – even where the interpretive committee or similar body does not have any actual power to bind the tribunal or court to whom interpretation is offered.[295] Although Art. 31 of the VCLT is silent as to the competent body or decision-maker to interpret treaties, the parties to a treaty designate such a body.[296] Article 267 of the TFEU provides the CJEU with jurisdiction over the interpretation of the TFEU, and these interpretative decisions are binding upon the Member States.[297] The CJEU's case law affirms the *erga omnes* effect of preliminary judgments and, in *Kühne & Heitz*, the CJEU even suggested that bodies might have an obligation to reopen matters to ensure that the CJEU's interpretation is properly applied.[298]

237. Preliminary rulings are afforded *erga omnes* effect where certain conditions are satisfied: (1) the questions of interpretation at issue are the same in the preliminary ruling as in the present case, and (2) there are no additional factors that could change such interpretation. Here, there are no additional factors, and the question of interpretation in the *Achmea* Decision and in the case at bar is the same: "*whether a provision in an international agreement concluded between EU Member States, under which an investor from one of those Member State 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,*

[292] *Id*., at §§ 5 – 6.

[293] *Id*., at § 7.

[294] *Id*., at § 47.

[295] *Id*., at §§ 47 – 51.

[296] *Id*., at §§ 48 – 49.

[297] *Id*., at §§ 53 – 54.

[298] *Id*., at § 55.

is precluded by Articles 267 and 344 of the TFEU."[299] Thus, there is strong support for the view that the Tribunal must also abide by the CJEU's interpretation.[300] Otherwise, investors of the EU and the Member States would be deprived of the legal certainty to which they are entitled.[301] Thus, the Tribunal is bound to rule that Arts. 267 and 344 of the TFEU preclude the dispute resolution clause contained in Art. 9(2) of the BIT.[302]

238. Even if the Tribunal finds that the *Achmea* Decision is not binding, it will nonetheless become so through the applicable law.[303] Questions of jurisdiction and, indeed, of consent are not governed by the law applicable to the merits, but rather by reference to the instruments in which the Parties' consent is contained, *i.e.* Art. 9(3) of the BIT and Art. 25(1) of the ICSID Convention. While both provide that international law applies to the Tribunal's determination of its jurisdiction, international law must be interpreted in accordance with the VCLT.[304] Any relevant rules set out under EU law, including CJEU decisions, would be treated like any other international rules for the purpose of Art. 31(3)(c) of the VCLT.[305] Thus, the CJEU's findings in *Achmea* will be part of the *acquis communautaire* and, thus, will have to be applied by the Tribunal as part of the law applicable to its jurisdiction.[306] EU law forms part of international law and, thus, must be considered in determining the extent of consent – both in ECT and in BIT cases.[307] *Achmea* further held that EU law doctrines are part of the general principles on international law, and Claimants have acknowledged that EU law is part of public international law.[308] Here, the issue

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299 *Id*., at § 57.

300 *Id*., at § 58.

301 *Id*., at §§ 58 – 59.

302 *Id*., at § 60.

303 *Id*., at § 61.

304 *Id*., at §§ 9 – 10.

305 *Id*., at § 65.

306 RPHB-I § 23; *Amministrazione Delle Finanza dello Stato v. Denkavit Italiana S.R.I*., Joined cases C-283/94, C-291/94 and C-292/94, Judgment of the Court (Fifth Chamber) (17 October 1996), EU:C:1996:387 § 16 **[RLA-0251]**.

307 Respondent's First Comments on *Achmea* Decision (28 March 2018), at 5; Respondent's Second Comments on *Achmea* Decision (2 May 2018), at §§ 11 – 13; RPHB-I §§ 21 – 22; Tr. Day 4 at 82:3 – 86:4 (R. Closing); *Accord entre le Gouvernement de la République française et le Gouvernement de la République populaire hongroise sur l'encouragement et la protection réciproques des investissements*, signed 6 November 1986, in force as of 30 September 1987 (together with the unofficial English translation published by the United Nations Treaty Series (UN Treaty Series – Vol. 1512,1-26131, 1988, 120)) [hereinafter, "France-Hungary BIT"], Art. 9(3) **[CLA-0001]** / **[RLA-0079]**; *Electrabel v. Hungary*, Decision on Jurisdiction **[CLA-0070]** ("*EU law has to be classified first as international law*"); *see also AES v. Hungary*, § 7.6.6 **[CLA-0062]** (*stating* that the EU's competition law regime is an "*international law regime*")

308 Respondent's Second Comments on *Achmea* Decision (2 May 2018), at §§ 14, 62 - 64.

is the interpretation of the TFEU and its impact on dispute resolution clauses contained in intra-EU BITs. The *Achmea* Decision touches on the same subject matter, within the meaning of Art. 31(3)(c) of the VCLT. Thus, in order to comply with the provisions of Art. 31(3)(c) of the VCLT, the Tribunal would need to apply the *Achmea* Decision when interpreting the TFEU. In so doing, the Tribunal would find that EU law applies directly to its jurisdiction in accordance with Art. 9(3) of the BIT, rendering Art. 9(2) of the BIT invalid at the time of the institution of these proceedings.[309]

239. To determine whether Hungary's offer to arbitrate contained in Art. 9(2) of the BIT and in 25(1) of the ICSID Convention was still present at the time the Claimants accepted it, the Tribunal must apply the conflict resolution tools of international law. These tools include the doctrine of primacy (*lex superior*), the *lex posterior* rule (also contained in Art. 30(3) of the VCLT), and the *lex specialis* rule. Here, the application of the *lex superior* rule is warranted, since the conflict between Art. 9(2) of the BIT and the TFEU concerns internal regime hierarchies in the relationship between Member States, thus rendering the other two conflict maxims inapplicable.[310] Respondent's revocation of its offer of consent – resulting both from the principles of *lex posteriori* and the principle of primacy, took effect prior to any arguable acceptance by Claimants.[311]

240. Under Art. 351 of the TFEU, in cases of incompatibility between an *inter se* Member State agreement and EU treaties, the conflicting provisions of the former agreement are rendered inapplicable. The ILC has confirmed the absolute precedence of EU treaties over agreements concluded between Member States *inter se*,[312] and this was endorsed by the tribunal in *Electrabel*.[313] The principle of primacy of EU law within the relationship between Member States, thus, renders Art. 9(2) of the BIT inapplicable, due to its incompatibility with Arts. 267 and 344 of the TFEU.[314]

241. The inapplicability of Art. 9(2) of the BIT also flows from Art. 30(3) of the VCLT, pursuant to which the provisions of an earlier treaty are applicable only so far as they are compatible with the

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[309] *Id*., at § 68, Respondent's First Comments on *Achmea* Decision (28 March 2018), at 5.

[310] Respondent's First Comments on *Achmea* Decision (28 March 2018), at 11; Respondent's Second Comments on *Achmea* Decision (2 May 2018), at §§ 16 – 18.

[311] Respondent's Second Comments on *Achmea* Decision (2 May 2018), at § 73.

[312] *Id*., at §§ 19 – 21.

[313] *Id*., at § 22.

[314] *Id*., at § 23.

provisions of the later treaty.[315] The possible neutralization of the dispute resolution clause contained in a BIT in case of incompatibility with a later treaty was specifically contemplated by the tribunal in the *Achmea* arbitration,[316] and was clarified by the CJEU in the *Achmea* Decision.[317] As a result, the incompatibility of Art. 9(2) of the BIT and the EU Treaties arose with Hungary's accession to the EU on 1 May 2004, because, as of that date, Hungary entered into an international treaty with France that was incompatible with Art. 9(2) of the BIT.[318] Alternatively, this incompatibility crystalized on 1 December 2009 when the TFEU came into effect. This incompatibility predates Claimants' effort to initiate proceedings pursuant to Art. 9 of the BIT in 2013.[319]

242. The 1957 TEEC was amended on numerous occasions and in 1992 became the Treaty on establishing the European Community (TEC) and in 2007 was renamed TFEU.[320] The incompatibility between Arts. 267 and 344 of the TFEU and the dispute resolution mechanisms contained in intra-EU BITs clarified in the *Achmea* Decision must be transposed to Arts. 292 and 234 of the TEC and to Arts. 177 and 219 of the TEEC.[321] The aforementioned articles are practically identical and the CJEU's interpretation of Art. 267 and 344 TFEU should necessarily be deemed to apply to legal relationships also arising out of Art. 177 and 219 of the TEEC or Arts. 234 and 292 of the TEC.[322] These treaties all serve one purpose: to ensure the uniform interpretation of EU law through the CJEU.[323]

243. The *MOX Plant* case further supports the argument that the Tribunal lacks jurisdiction, as that case confirms that, in addition to jurisdiction based on the treaty, a tribunal must satisfy itself that

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[315] *Id*., at §§ 25 – 26.

[316] *Achmea B.V. v. Slovak Republic*, UNCITRAL, PCA Case No. 2008-13 (formerly *Eureko B.V. v. Slovak Republic*), Award on Jurisdiction, Arbitrability and Suspension (October 26, 2010) ["*Achmea v. Slovakia* Award on Jurisdiction"], §§ 272-273 **[RLA-0250]**.

[317] *Id*. at §§ 239 – 240; Report of the Study Group of the ILC, Fragmentation of International Law – Difficulties Arising from the Diversification and Expansion of International Law, A/CN.4/L.682 (April 13, 2006), § 23, available at: http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf

[318] Respondent's First Comments on *Achmea* Decision (28 March 2018), at 6 – 7; Respondent's Second Comments on *Achmea* Decision (2 May 2018), at §§ 40 – 44.

[319] Respondent's Second Comments on *Achmea* Decision (2 May 2018), at § 46.

[320] *Id*., at § 37.

[321] *Id*., at § 35.

[322] *Id*., at §§ 38 (table), 39.

[323] *Id*., at § 40.

it had jurisdiction in a definitive sense.[324] That tribunal suspended its proceedings pending the issuance of a CJEU's decision because it considered that its jurisdiction could be precluded by the CJEU's finding. The *MOX Plant* tribunal never reached the issue because Ireland withdrew its claim. As in the case before this Tribunal, whether arbitration clauses contained in intra-EU BITs violate Arts. 344 and 267 of the TFEU was an issue to be determined solely by the CJEU – the body with exclusive authority to interpret EU law with finality.[325] The Tribunal should defer to the *Achmea* Decision and conclude that it lacks jurisdiction to adjudicate this dispute owing to the preclusion of Art. 9(2) of the BIT.[326]

244. A State may revoke its consent to ICSID's jurisdiction through the conclusion of another treaty (such as the TFEU) that is incompatible with the BIT and which, by operation of the principles of international law, would lead to the termination or inapplicability of the BIT, either as a whole or with respect to specific provisions of the BIT.[327] The revocation of consent does not run afoul of Art. 25 of the ICSID Convention or any other applicable rules of international law. While both the ICSID Convention and the VCLT preclude a State from relying *ex post facto* on its own laws to avoid international liability, these limitations do not preclude the Tribunal from acknowledging the significance of the *Achmea* Decision in terms of clarifying the Tribunal's lack of jurisdiction.[328] Respondent is not seeking to rely on its own domestic law to escape international legal obligations, and the "*internal law*" referred to in Art. 27 of the VCLT cannot reasonable be read as encompassing law which directly derives from or incorporates international agreements.[329] Rather, Respondent is invoking EU law to explain why a provision of the BIT is no longer applicable.[330]

(c) Whether Restraint from Jurisdiction Results in Denial of Justice

245. In the alternative, the Tribunal should refrain from exercising its jurisdiction.[331] Respondent explains that "[o]*ne of the compelling reasons not to exercise jurisdiction a tribunal otherwise*

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[324] Respondent's First Comments on *Achmea* Decision (28 March 2018), at 7.

[325] *Id*., at 8.

[326] *Id*., at 9.

[327] Respondent's Second Comments on *Achmea* Decision (2 May 2018), at §§ 16, 70 – 72.

[328] *Id*., at § 69.

[329] *Id*., at § 74.

[330] *Id*., at § 75.

[331] *Id*., at 9.

has is to prevent the fragmentation of international law resulting from the proliferation of international [sic] *and/or the issuance of conflicting decisions and unenforceable awards*."[332] Tribunals have relied on principles of judicial propriety or comity to refrain from exercising jurisdiction.[333] Indeed, the tools for coordinating between proceedings and decisions of different *fora* – including comity, *lis alibi pendens*, *res judicata* – are available and tribunals should make efforts to utilize them to achieve the appropriate level of cohesion.[334] The incompatibility of the BIT and EU law need not be resolved by recourse to Arts. 30(3) or 59(1) of the VCLT.[335]

246. The enforcement of an award to be issued by the Tribunal will be impossible within the EU because, owing to the *erga omnes* effect of the *Achmea* Decision, Member States would be in breach of EU law if their judicial organs enforced an award that was rendered in breach of EU law.

247. Disregarding the *Achmea* Decision and entertaining the merits of this dispute would lead to conflicting decisions by the Tribunal and the CJEU. The CJEU has decided that clauses such as Art. 9(2) of the BIT are precluded, with the resultant implication that disputes based on intra-EU BITs should be dealt with by Member State courts or arbitral *fora* that form part of the judicial system of the EU.[336]

248. It is only Art. 9(2) of the BIT offering the possibility of referring disputes in connection with dispossession measures to ICSID arbitration that is in conflict with Art. 267 and 344 of the TFEU. The default mechanism in the BIT for the resolution of disputes in the domestic forum has been fully retained. Because the domestic courts of Hungary and France are "*courts of a Member State*" within the meaning of Art. 267 of the TFEU, recourse to those courts does not conflict and is not rendered inapplicable by virtue of the *Achmea* Decision.[337] Claimants' argument that they have no standing before domestic courts is without merit. Based on the concept of sincere cooperation, the principle of mutual trust between Member States establishes a presumption of compliance by other Member States with EU law and fundamental rights. There is a strong presumption that Hungarian courts respect EU law and fundamental rights during their

[332] *Id*..

[333] *Id*.

[334] *Id*., at 10.

[335] *Id*., at 11.

[336] *Id*., at 10.

[337] Respondent's Second Comments on *Achmea* Decision (2 May 2018), at §§ 80 – 82.

proceedings.[338] The BIT is part of Hungary's and France's internal legal order, and the substantive rights contained therein are automatically protected in each. Thus, Claimants automatically have standing to pursue these rights.[339]

249. Even if Claimants had no other forum to bring their claims, that would not override the deficiencies in the Tribunal's jurisdiction. *Germany v. Italy* is illustrative, as there, the ICJ rejected Italy's argument expressly acknowledging that application of certain norms might result in a denial of justice. By analogy, in this case, there is nothing which would deprive international law of its force based on the Claimants' individual claims of denial of justice.[340]

(d) Application of the *Forum Prorogatum* Principle

250. There is little support for the position that consent can be waived through a *forum prorogatum* principle or estoppel theory.[341] Such a theory would need to be premised on a finding of actual or constructive knowledge of the Respondent. In this case, there is no such possibility.[342] In the present instance, the CJEU's issuance of the *Achmea* Decision conclusively established the conflict between the dispute resolution clauses allowing investor-state arbitration contained in intra-EU BITs with EU law.[343] It would have been impossible for the Respondent to raise the issue of the lack of its valid offer to arbitrate prior to the issuance of that decision.

251. Respondent's prior statements concerning its consent to arbitrate during the course of the Hearing on Jurisdiction and prior have no relevance. The Tribunal's Decision on Jurisdiction was issued the same day that the German Federal Supreme Court decided to make the *Achmea* referral to the CJEU, and this was not made public until May 2016. By the time Respondent became aware of the *Achmea* referral, the Tribunal had already issued its Decision of Preliminary Issues of Jurisdiction.[344]

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[338] *Id*., at §§ 85 – 86.

[339] *Id*., at §§ 83 – 84.

[340] *Id*., at §§ 87 – 92; *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, ICJ, Judgment (February 3, 2012), available at: http://www.icj-cij.org/files/case-related/143/143-20120203-JUD-01-00-EN.pdf., at 101 – 104.

[341] Respondent's Second Comments on *Achmea* Decision (2 May 2018), at § 76.

[342] *Id*.

[343] *Id*., at 77.

[344] *Id*., at § 78.

3. The Tribunal's Considerations and Conclusions

252. The Tribunal has carefully considered the many arguments which the Parties have submitted regarding the *Achmea* Decision and the relevance of European Law. Of these, it will address only those which in its view are determinative for its decision in this matter in the case at hand. The Tribunal is also aware of the wide discussion to which the *Achmea* Decision has lead both in later jurisprudence and in academic writing and conferences. However, in the present Award, the Tribunal does not consider that a detailed discussion of the substance of *Achmea* is required, because the present case differs in determinative aspects from the case in *Achmea*.

253. First and most importantly, contrary to that in the *Achmea* case, this Tribunal's jurisdiction is based on the ICSID Convention. *i.e.* a multilateral public international law treaty for the specific purpose of resolving investment disputes between private parties and a State (here, Hungary). Thus, this Tribunal is placed in a public international law context and not in a national or regional context.

254. With regard to the relevance of the *Achmea* Decision for the present arbitration, the Tribunal notes that the *Achmea* Decision relies expressly on the following aspects:

- The place of arbitration is Frankfurt, Germany, with the result that German law applies to the arbitration proceedings[345]
- The judicial review of the validity of the award was within the competence of the German courts and was exercised by these courts[346]
- That it was in this review process that the German Federal Court of Justice (*Bundesgerichtshof*) submitted the preliminary questions to the EU-Court.[347]

255. None of these factors exist in the present case:

- While the place of arbitration according to PO-1 § 10.1 is London, it is not English law, but exclusively the ICSID Convention and ICSID Arbitration Rules are applicable to the proceedings.
- The judicial review of the validity of the award is not in the competence of the English courts or of any other national courts, but subject exclusively to the annulment procedure according to Art. 52 of the ICSID Convention,
- This annulment review leads to a final decision by an international *ad hoc* committee, which is not subject to further review by any other

[345] *Achmea* Decision, § 10.

[346] *Id.*, at §§ 52 and 53.

[347] *Id.*, at 23.

court.

256. Further, Arts. 53 and 54 of the ICSID Convention provide as follows:

> ***Article 53***
>
> (1) *The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.*
>
> (2) *For the purposes of this Section, "award" shall include any decision interpreting, revising or annulling such award pursuant to Articles 50, 51 or 52.*
>
> ***Article 54***
>
> (1) *Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.*

257. Thereby, Hungary as a party to the ICSID Convention is expressly bound by the Tribunal's Award in the present case, has no option of appeal outside the ICSID system, and has to recognize the present Award as binding and enforce the pecuniary obligations imposed by this Award within its territories as if it were a final judgment of a court in Hungary.

258. The *Achmea* Decision contains no reference to the ICSID Convention or to ICSID Arbitration. Therefore, and in view of the above mentioned determinative differences between the *Achmea* case and the present one, the *Achmea* Decision cannot be understood or interpreted as creating or supporting an argument that, by its accession to the EU, Hungary was no longer bound by the ICSID Convention.

259. There is no rule in EU law that provides that these obligations under the ICSID Convention are inconsistent with EU law or that obligations under the ICSID Convention have been terminated or replaced by the accession to the EU. Regardless of what may be argued from the *Achmea* Decision regarding BITs between EU Member States, as regard jurisdiction under the ICSID Convention it is undisputed that Hungary did not expressly terminate its participation in and submission to arbitration pursuant to the ICSID Convention when it joined the EU in 2004.

260. The Tribunal also cannot find that the accession to the EU was an implied withdrawal from the ICSID Convention. There was no denunciation of the ICSID Convention, pursuant to Art. 71

thereof. The burden of establishing an implied withdrawal lies with Respondent. The Respondent has failed to establish its case.

261. However, even if, *arguendo*, the Respondent were to be considered to have denounced the ICSID Convention, this denunciation would not have the effect of retroactively withdrawing the Respondent's acceptance of ICSID arbitration contained in the BIT. Article 72 of the ICSID Convention specifies that the denunciation of the ICSID Convention leaves unaffected the consent previously perfected:

> *Notice by a Contracting State pursuant to Articles 70 or 71 shall not affect the rights or obligations under this Convention of that State or of any of its constituent subdivisions or agencies or of any national of that State arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary.*

262. Denunciation of the ICSID Convention, therefore, cannot have the effect of retroactively withdrawing consent. In this context, Claimants correctly quote Professor Schreuer:

> *Article 72 of the ICSID Convention constitutes a special application of the principle of irrevocability, expressed in more general terms in the last sentence of Article 25(1). When the parties have given their consent, no party may withdraw its consent unilaterally by direct or indirect means. This includes an attempted withdrawal of consent by way of a denunciation of the Convention.*[348]

263. The *Achmea* Decision itself does not support any other conclusion. As mentioned above, the CJEU did not say anything in the *Achmea* Decision about the effect of its Decision on consent to arbitration under Art. 25 of the ICSID Convention.

264. The Respondent has not demonstrated in any way that EU law (as interpreted by the CJEU in the *Achmea* Decision) would have the effect of validly withdrawing the Respondent's consent to arbitration with retroactive effect. As a consequence, Art. 25 of the ICSID Convention applies and the Respondent's consent remains valid. Accordingly, the Tribunal has jurisdiction under the Convention.

265. Even further assuming *arguendo* that the France-Hungary BIT was retroactively terminated as of 1 May 2004, the BIT – including the submission to ICSID arbitration in Art. 9(2) of the BIT – would still remain in force for a period of 20 years as a result of the "*survival clause*" contained in Art. 12(2) of the BIT as this provision does not contain any limitation or exception as to its

[348] C. Schreuer, "Chapter 15: Denunciation of the ICSID Convention and Consent to Arbitration", *in* M. Waibel, A. Kaushal, K-H. L. Chung, C. Balchin, The Backlash against Investment Arbitration: Perceptions and Reality, 2010, 363, *available at*: http://www.univie.ac.at/intlaw/wordpress/pdf/denunciation icsid.pdf.

application and applies to all investments made prior to the expiry of this Agreement. Thus, investments made prior to the expiration of this BIT remain submitted to it for a period of 20 years from the date of expiry. In the present case, the investments were made prior to 1 May 2004. Therefore, the Claimants would still benefit from the protection offered by the ICSID Convention until 2024. As is undisputed, neither Hungary nor France has made any attempt to renegotiate, modify, or shorten the relevant "*survival*" period. Accordingly, even on the Respondent's own analysis regarding the BIT, the Claimants would still benefit from Art. 9(2) of the BIT and the ICSID Convention, and the Tribunal would still have jurisdiction to hear this case.

266. On the basis of the above considerations, the Tribunal concludes that the *Achmea* Decision does not change the conclusion reached by this Tribunal in its Decision of 3 March 2016 that the Tribunal has jurisdiction over all the claims raised.

267. In view of this conclusion, the Tribunal does not need to address the awards that other tribunals have issued recently after and taking into account the *Achmea* Decision.

C. TRIBUNAL QUESTION (E) REGARDING OTHER RELEVANT ISSUES IN EU LAW

> *e)* *Any consequential or other issue of EU law that may be relevant to the Tribunal's consideration of the case, having regard, inter alia, to Order No. 3 of the Tribunal in* The MOX Plant Case (Ireland v. United Kingdom)*, PCA Case 2002-01, Order of 24 June 2003.*

1. Claimants' Arguments

268. There is no consequential or other issue of EU law, having regard in particular to the *MOX Plant* case, that may be relevant to the Tribunal.[349] In that UNCLOS arbitration between Ireland and the UK, the tribunal suspended the arbitration pending a CJEU decision. This case has no relevance in Respondent's request for a delay or postponements, pending the outcome of the *Achmea* case.[350] As indicated in response to the Tribunal's question (a), regardless of its outcome, the *Achmea* Decision will have no impact on the Tribunal's jurisdiction.

269. Further, the circumstances upon which the UNCLOS tribunal based its decision are different from the present case in two material respects.[351] First, the UNCLOS tribunal's jurisdiction was based

[349] CPHB-I § 308.

[350] *Id*., at § 309.

[351] *Id*.

on the UNCLOS, to which Ireland and the UK, as well as the EU, were party. There, the UK alleged that, due to the EU's declaration that such provisions covered by the UNCLOS had been transferred to the EU, making the provisions EU law. The question was, therefore, whether the exclusive jurisdiction of the CJEU extended to the interpretation and application of the UNCLOS, as part of EU law.[352] Here, (1) the EU is not party to the BIT, (2) matters covered by the BIT have not been transferred to the EU and do not relate to EU law, and (3) the CJEU has no exclusive jurisdiction upon the interpretation and application of the BIT.[353]

270. Second, the UNCLOS tribunal considered Art. 282 of the UNCLOS, which provides that UNCLOS tribunals have only a subsidiary jurisdiction if the parties have agreed to another procedure for the interpretation or application of the UNCLOS. Thus, in that case, there was a substantial doubt related to the jurisdiction of the UNCLOS tribunal, as well as the risk of future conflicting decisions. This case presents no such risk because the BIT is the only competent forum: (1) the BIT does not include a provision similar to Art. 282 and, therefore, the Tribunal does not have subsidiary jurisdiction, (2) the dispute is between a private investor and a State, while the CJEU can only hear disputes between Member States, and (3) the CJEU has no jurisdiction to hear a case under the BIT. There is, therefore, no risk of conflicting decisions.[354]

2. Respondent's Arguments

271. The *MOX Plant* case offers useful guidance as it concerned a tribunal that relied on the principle of comity to suspend arbitration proceedings pending the determination of an issue that had the potential to impact the tribunal's jurisdiction by the CJEU.[355] In that case, the CJEU had to determine whether the provisions of the UNCLOS invoked by Ireland were matters over which competence had been transferred to the European Community and, thus, whether the CJEU's exclusive jurisdiction extended to the interpretation and application of UNCLOS.[356]

272. While there are key differences between the *MOX Plant* case and this case, the differences in the

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[352] *Id.*, at 310; *Ireland v. The United Kingdom*, MOX Plant Case, PCA, Procedural Order No. 3 (24 June 2003) [hereinafter "*MOX Plant* Case"] § 21 **[CLA-0251]** / **[RLA-0263]**; Declaration or Statements upon UNCLOS ratification, United Nations, as of 29 October 2013 **[CLA-0252]**.

[353] CPHB-I § 310.

[354] *Id.*, at § 311; UNCLOS, Art. 282 **[CLA-0253]**; *MOX Plant* Case, §§ 22 – 25, 28 **[CLA-0251]** / **[RLA-0263]**; Tr. Day 4 at 83:3-16 (Respondent does not dispute that this dispute is between a private investor and a state).

[355] RPHB-I § 47; *MOX Plant* Case, § 1 **[CLA-0251]** / **[RLA-0263]**.

[356] RPHB-I § 48; *MOX Plant* Case, § 21 **[CLA-0251]** / **[RLA-0263]**.

parties, the nature of the treaties, and the nature of the referral do not undermine the relevance of the *MOX Plant* case to the request for the suspension of these proceedings based on *Achmea*.[357]

273. In *MOX Plant*, doubts were cast on the UNCLOS tribunal's jurisdiction, and the question of whether certain provisions of the underlying treaty could be relied upon before the tribunal arose. Although formulated differently, this is the same question being confronted in *Achmea*: *i.e.,* whether an investor can rely on a dispute resolution provision of an intra-EU BIT before an arbitral tribunal.[358]

274. While this Tribunal (like the one in *MOX Plant*) is satisfied that it has jurisdiction *prima facie*, it must also be able to satisfy itself that it has jurisdiction in a definitive sense, before proceeding to any final decision on the merits.[359] The UNCLOS tribunal, therefore, took account of the possible outcome of the CJEU's prospective decision and its import to the tribunal's jurisdiction.[360] Importantly, in that case, the UNCLOS tribunal emphasized that the matters to be decided by the CJEU concerned the legal order of the European Communities, to which the parties to those proceedings were subject and which were "*to be determined within the institutional framework of the European Communities*."[361] Similarly, in this case, the issue of whether the dispute resolution clauses in the intra-EU BITs violate Art. 344, 267, and 18 of the TFEU is an issue to be determined solely by the CJEU – the body with exclusive authority to interpret EU law with finality.[362]

275. The UNCLOS tribunal recognized that the determination of its jurisdiction was dependent upon the resolution of the problems to be determined by the CJEU. Thus, mindful of the need to prevent the fragmentation of international law, the tribunal suspended the arbitration based on considerations of mutual respect and comity.[363] That situation is similar to here, as, if the CJEU establishes that the dispute resolution clauses of certain intra-EU BITs, such as the one in the case at hand, conflict with a particular provision of the TFEU, it could contradict the decision of the

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[357] RPHB-I §§ 49 – 50.

[358] *Id*., at § 51; *MOX Plant* Case, §§ 20 – 21 **[CLA-0251]** / **[RLA-0263]**.

[359] RPHB-I §§ 52 – 53; *MOX Plant* Case, § 14 **[CLA-0251]** / **[RLA-0263]**.

[360] RPHB-I § 53; *MOX Plant* Case, § 15 **[CLA-0251]** / **[RLA-0263]**.

[361] RPHB-I § 54; *MOX Plant* Case, § 24 **[CLA-0251]** / **[RLA-0263]**.

[362] RPHB-I § 54; *see e.g*., *Achmea v. Slovakia*, Award on Jurisdiction, § 282 **[RLA-0250]**; *EAIB v. Slovakia*, § 248 **[CLA-0243]** / **[RLA-0259]**.

[363] RPHB-I § 55; *MOX Plant* Case, §§ 23, 28 **[CLA-0251]** / **[RLA-0263]**.

Tribunal concerning its own jurisdiction.[364] It would therefore be appropriate, based on the principle of comity, and reinforced by the *MOX Plant* case, for the Tribunal to delay or postpone its final deliberations and issuance of an award until after *Achmea* is decided. The Tribunal may stay proceedings pursuant to Art. 44 of the ICSID Convention and Art. 19 of the Arbitration Rules.[365]

3. The Tribunal's Considerations and Conclusions

276. The Tribunal agrees with the Claimants that the *MOX Plant* case provides no useful guidance in view of the considerable differences between that case and the present case.

277. First, the UNCLOS tribunal's jurisdiction was based on the UNCLOS to which Ireland and the UK, as well as the EU, were party. In the present case, the EU is not a party to the BIT, matters covered by the BIT have not been transferred to the EU and do not relate to EU law, and the CJEU has no jurisdiction in respect of the interpretation and application of the BIT.

278. Second, in the *MOX Plant* case, there was significant doubt with respect to the jurisdiction of the UNCLOS tribunal as well as a risk of future conflicting decisions. The present case presents no such risk since the BIT is the only competent forum. Clearly, the CJEU has no jurisdiction to hear a case under the BIT.

279. Finally, and as Respondent noted in its submissions on *Achmea*,[366] the *MOX Plant* tribunal never dealt with the issue of jurisdiction as, after it suspended its proceedings, Ireland withdrew its claim.

VII. APPLICABLE LAW

A. RELEVANT TERMS OF THE BIT

280. Article 9(3) of the BIT provides that:

> *The arbitral tribunal shall rule in accordance with the provisions of this Agreement and the rules and principles of international law.*[367]

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364 RPHB-I § 56.

365 *Id.*, at § 57; *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to the Jurisdiction (29 January 2004) § 173 **[RLA-0266]**.

366 Respondent's First Comments on *Achmea* Decision (28 March 2018), at 8.

367 France-Hungary BIT, Art. 9(3) **[CLA-0001]** / **[RLA-0079]**.

281. Claimants argue that this dispute is governed by the BIT and international law. Pursuant to Art. 42(1) of the ICSID Convention, the choice of law contained in Art. 9(3) of the BIT is binding.[368]

282. Respondent has presented that Art. 5(2) of the BIT is the applicable legal standard with respect to expropriation.[369] Respondent denies everything not expressly admitted.[370]

283. The Tribunal agrees that Art. 9(3) of the BIT has to be applied.

B. ARGUMENTS RELATED TO THE RELEVANCE OF OTHER DECISIONS AND PARTICULARLY THE *EDENRED* AWARD

284. In this context, though not an issue of the applicable law *per se*, the Tribunal has taken note of the submissions by the Parties regarding other decisions and particularly the Award in the *Edenred* case,[371] which was issued during the course of the present proceedings.

285. On 27 March 2017, the Parties simultaneously submitted their respective comments on the *Edenred* Award to the Tribunal. While the Parties agree that the *Edenred* case has striking similarities with the present matter, they differ on the role that the *Edenred* Award should have in the present matter.

1. Claimants' Arguments

286. Claimants argue that, although the *Edenred* Award cannot be determinative of the Tribunal's decision, it may shed useful light on some issues. While there are differences in the factual record, four specific factual findings made in *Edenred* are relevant to this case: (1) the criteria established by Hungary for the issuance of the SZÉP Card were tailored to exclude Non-Hungarian Issuers, (2) the purpose underlying the creation of the Erzsébet vouchers was to enable 100% of the profit to remain in Hungary and serve a public purpose and the exclusion of Non-Hungarian Issuers was intentional, (3) the allegations that Claimants were charging high commissions to their clients and

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[368] C-I §§ 81 – 84; Christoph H. Schreuer, Loretta Malintoppi, August Reinisch & Anthony Sinclair, The ICSID Convention: A Commentary, 2nd Edition, Cambridge University Press, 2009, §§ 42-80 **[CLA-0007]**; *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability (14 December 2012) [hereinafter "*Burlington v. Ecuador* Decision on Liability"], § 392 **[CLA-0008]** / **[RLA-0017]**; Campbell McLachlan, Laurence Shore, and Matthew Weiniger, International Investment Arbitration Substantive Principles, 1st Edition, Oxford University Press, 2007, § 1.38 **[CLA-0009]**.

[369] R-I § 163; France-Hungary BIT, Art. 5(2) **[CLA-0001]** / **[RLA-0079]**.

[370] R-II § 4.

[371] *Edenred v. Hungary*, ICSID Case No. ARB/13/21 (Award) (13 December 2016) [submitted by Claimants on 24 February 2017].

affiliates are false and the 2011 Reform did not significantly reduce the fees and costs associated with the Erzsébet voucher, and (4) despite amendments to the tax system that have occurred since 1 January 2017 in light of the CJEU decision against Hungary, those are an *ex post* amendment that should have no bearing on the merits of the case. *Edenred* confirmed that the 2011 Reform breached Art. 5(2) of the BIT and that Hungary must compensate the investor for that breach. Although there are factual distinctions between the *Edenred* case and this one, the *Edenred* tribunal's approach to the DCF valuation is consistent with Claimants' expert's approach in the present case. Claimants' damages case is different from that in *Edenred*, where the claimant created a counter-factual scenario in which Hungary could have introduced the SZÉP Card and the Erzsébet voucher without expropriatory effect. Here, Claimants demonstrate that that could not have happened, as the SZÉP Card and the Erzsébet voucher would have been ordinary competitors in the meal voucher market and would not have been able to acquire a significant market share from the already-established players in Hungary. The present case also involves different arguments and facts concerning the dematerialization of the vouchers.

2. Respondent's Arguments

287. Respondent explained that the *Edenred* Award offers limited useful guidance to the Tribunal and, given its potential prejudicial impact and the absence of a *stare decisis* doctrine in investment arbitration, it should be deemed irrelevant to its deliberations. The only guidance that the Tribunal could draw from the *Edenred* Award relates to how that tribunal recited generally-held legal principles and points of law. The *Edenred* tribunal's application of these principles, however, was inconsistent with predominant and accepted (though non-binding) views of international law and investment law jurisprudence. Importantly, the Tribunal cannot consider the *Edenred* tribunal's determination(s) or characterization(s) of the factual evidence. It is precisely because of the factual and other similarities between the present case and the *Edenred* dispute that Respondent objects to any consideration of the *Edenred* Award in these proceedings. The *Edenred* tribunal faced a different record than the one before the Tribunal, but assessed some of the same factual and expert evidence as has been presented in this case. This places Respondent in the impossible position of needing to refute *Edenred* arguments in these proceedings, as the same claims could now be adopted by Claimants, who may seek to draw conclusions based on comparing the testimony of witnesses who appear in both cases. Notably, neither Claimants nor their witnesses are subject to the same degree of scrutiny. The *Edenred* tribunal's decision regarding indirect expropriation is predicated on an erroneous factual finding – one that is both incorrect and at odds with the *Edenred* tribunal's own description of the record. The *Edenred* tribunal's reliance on the CJEU adjudication – one that involved an entirely different legal system

with no relevance under the BIT – was also improper. Finally, the *Edenred* tribunal's damages award disregards recent changes to the fringe benefit system undertaken in light of the CJEU Decision and thereby gave Edenred a double recovery. Although the facts here differ, the risk of granting Claimants a double recovery is no less significant.

3. Tribunal Considerations and Conclusions

288. In addition to the *Edenred* Award, the Parties have extensively referred to decisions of other tribunals. However, there is no dispute that, in any event, the decisions of other tribunals are not binding on the Tribunal. The many references by the Parties to certain arbitral decisions in their pleadings do not contradict this conclusion.

289. This does not preclude the Tribunal from considering arbitral decisions and the arguments of the Parties based upon them, to the extent that it may find that they shed any useful light on the issues that arise for the decision in the present case.

290. Such an examination, including the *Edenred* Award, is conducted by the Tribunal later in this Award, after the Tribunal has considered the Parties' contentions and arguments regarding the various issues argued and relevant for the interpretation of the applicable BIT provisions, while taking into account the specificity of the BIT to be applied in the present case.

VIII. RESPONDENT'S LIABILITY PURSUANT TO THE TREATY

A. EXPROPRIATION / DISPOSSESSION (ART. 5(2) OF THE BIT)

291. The Parties dispute whether Art. 5(2) of the BIT has been breached.[372] Article 5(2) provides that:

> *The Contracting Parties shall not take any expropriation or nationalization measures or any other measures which could cause the investors of the other Party to be dispossessed, directly or indirectly, of the investments belonging to them in its territory and maritime zones, except for reasons of public necessity and on condition that these measures are not discriminatory or contrary to a specific undertaking.*

1. The Existence of a Right Capable of Expropriation / A Vested Right

(a) Claimants' Arguments

292. This dispute arises out of Claimants' indirect (in the case of UP) and direct (in the case of CD

[372] C-I §§ 242 – 243; R-I § 163.

Internationale) shareholding in CD Hungary. This shareholding is a property right under Hungarian law and, as the Tribunal observed in the Decision on Jurisdiction, is an investment for the purposes of the BIT and Art. 25 of the ICSID Convention.[373]

293. Relying on the decision in *Emmis*, Respondent argues that Claimants' case "*fails because they are not able to demonstrate that they had a property right that is even capable of being expropriated.*"[374] Respondent's argument is without merit. Claimants' claims concern Respondent's indirect expropriation of their shareholding in CD Hungary – and this shareholding is similar to what the Respondent – in *Emmis* – accepted as an investment capable of expropriation. Thus, *Emmis* restates the uncontested principle that "*property rights that are the subject of protection under the international law of expropriation are created by host State law*."[375] Claimants' shareholding is a vested property right under Hungarian law and, therefore, constitutes a "*right capable of expropriation*." Claimants have, therefore, discharged the "*burden of proving that they had a property interest capable of being expropriated*."[376]

294. Contrary to Respondent's suggestion, Claimants do not submit that Respondent expropriated "*a right to expect stability*." Nor do Claimants "*assert a right to a particular tax or regulatory system*" or argue that "*the value of their company was expropriated vis-à-vis a diminution in the value of their potential future profit*." Rather, Claimants submit that Respondent expropriated their shareholding in CD Hungary and the right to bring such a claim is well-established.[377]

295. The present proceedings are not comparable to those in *Generation Ukraine v. Ukraine* or *Merrill & Ring v. Canada*. Neither case concerned the expropriation of a shareholding. Like *Emmis*, these cases concerned claims by an investor to "*recover damages for the expropriation of a right*

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[373] C-I §§ 64 – 65; C-II §§ 146 – 147, 160 – 162; R-I §§ 162, 177; Decision on Jurisdiction, 3 March 2016, § 139.

[374] C-II § 148; *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. The Republic of Hungary*, ICSID Case No. ARB/12/2, Award (16 April 2014) [hereinafter "*Emmis v. Hungary* Award"] **[RLA-0027]**.

[375] C-II § 152; Campbell McLachlan QC, Laurence Shore and Mathew Weiniger, International Investment Arbitration: Substantive Principles (Oxford University Press 2007) **[RLA-0100]**.

[376] C-II §§ 149 – 152, 155; *Emmis v. Hungary* Award, §§ 155, 162, 170 **[RLA-0027]**; *Emmis International Holding, B.V. and others v. Hungary*, ICSID Case No. ARB/12/2, Decision on Respondent's Application for Bifurcation (13 June 2013) [hereinafter "*Emmis v. Hungary* Decision on Bifurcation"], § 57 **[RLA-0028]**; Campbell McLachlan QC, Laurence Shore and Mathew Weiniger, International Investment Arbitration: Substantive Principles (Oxford University Press 2007) § 8.65 **[RLA-0100]**.

[377] C-II §§ 153 – 154; Andrew Newcombe and Lluis Paradell, Law and Practice of Investment Treaties: Standards of Treatment, 1st Edition, Kluwer Law International, 2009, 289, 304 **[CLA-0064]**; *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. ARB V079/2005, Award (12 September 2010) [hereinafter "*RosInvest v. Russia*"], § 608 **[CLA-0099]**.

it never had." Claimants, however, seek to recover damages for the expropriation of the "*vested property right*" – *i.e.*, their shareholding in CD Hungary. The situations are, therefore, not comparable.[378]

(b) Respondent's Arguments

296. As Claimants concede, an investor cannot make a successful claim for expropriation without first demonstrating that it had an asset, right, or interest of which they could be deprived by the host State.[379] As was affirmed in the *Emmis* decision and other cases,[380] to determine whether this threshold is met, tribunals consider how property rights are defined within the host jurisdiction. Considering Hungarian law, the *Emmis* tribunal concluded that the essential attribute of a property right is that it is "*an asset capable of ownership, valuation and alienation.*"[381] Tribunals must meticulously identify the rights alleged to have been expropriated.[382] Once it is confirmed that such a right has been affected, the analysis turns to whether the taking is expropriatory.[383] The

[378] C-II §§ 156 – 158; *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award (16 September 2003) [hereinafter "*Generation Ukraine v. Ukraine*"], §§ 6.12, 6.12(e), 22.1 **[CLA-0038]** / **[RLA-0032]**; *Emmis v. Hungary* Award **[RLA-0027]**; *LG&E Energy Corp., LG&E Capital Corp., and LG&E Int'l Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (October 3, 2006) [hereinafter "*LG&E v. Argentina* Decision on Liability"] **[CLA-0041]** / **[RLA-0038]**; *Merrill & Ring Forestry L.P. v. The Government of Canada,* UNCITRAL, ICSID Administered Case, Award (31 March 2010) [hereinafter "*Merrill & Ring v. Canada*"] **[RLA-0042]**.

[379] R-I § 164; R-II §§ 208 – 209; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award (27 August 2009) [hereinafter "*Bayindir v. Pakistan*"], § 442 **[RLA-0013]**; *Chemtura Corporation v. Government of Canada*, *Ad Hoc* NAFTA Arbitration under UNCITRAL Rules, Award (2 August 2010) [hereinafter "*Chemtura v. Canada*"], § 242 **[RLA-0018]**; *Emmis v. Hungary* Award, § 169 **[RLA-0027]**; *Generation Ukraine v. Ukraine*, § 8.8 **[CLA-0038]** / **[RLA-0032]**; *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award (6 July 2012) § 320 **[RLA-0067]**; Andrew Newcombe and Lluís Paradell, Law and Practice of Investment Treaties: Standards of Treatment § 7.1 (Kluwer Law International BV 2009) **[RLA-0101]**.

[380] *EnCana Corp. v. Republic of Ecuador*, UNCITRAL, LCIA Case No. UN3481, Award (3 February 2006) [hereinafter "*EnCana v. Ecuador*"], § 184 **[CLA-0019]** / **[RLA-0158]**; *Int'l Thunderbird Gaming Corp v. United Mexican States*, UNCITRAL/NAFTA, Arbitral Award (26 January 2006) § 208 **[RLA-0160]**.

[381] R-I § 172; *Emmis v. Hungary* Award, § 192 **[RLA-0027]**; *Emmis International Holding, B.V. and others v. Republic of Hungary*, ICSID Case No. ARB/12/2, Decision on Respondent's Objection under ICSID Arbitration Rule 41(5) (11 March 2013) [hereinafter "*Emmis v. Hungary* Decision on 41(5)"] **[RLA-0029]**; Campbell McLachlan QC, Laurence Shore and Mathew Weiniger, International Investment Arbitration: Substantive Principles (Oxford University Press 2007) **[RLA-0100]**.

[382] R-II § 211; *Generation Ukraine v. Ukraine*, §§ 6.2, 8.8 **[RLA-0032]**.

[383] R-I §§ 165 – 167, 171; *Bayindir v. Pakistan*, § 442 **[RLA-0013]**; *Emmis v. Hungary* Award, § 162 **[RLA-0027]**; *Emmis v. Hungary* Decision on 41(5), § 173 **[RLA-0029]**; *Methanex Corporation v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits (3 August 2005) [hereinafter "*Methanex v. USA*"], § 7 **[RLA-0045]**; *Saluka Investments BV (The Netherlands) v. The Czech Republic*, PCA - UNCITRAL Arbitration Rules, Partial Award (17 March 2006) [hereinafter "*Saluka v. Czech Republic*"], § 255 **[CLA-0049]** / **[RLA-0059]**; Campbell McLachlan QC, Laurence Shore and Mathew Weiniger,

RosInvest and *ST-AD* cases, among others, demonstrated that while a shareholder may claim a loss in value resulting from damage to the company in which it invested, that damage must result from interference with a separate and distinct property right to be recoverable.[384]

297. Respondent does not dispute that Claimants have an investment – their shareholding – for the purposes of asserting jurisdiction. The existence of this right, however, is irrelevant because the shareholding is not what Claimants allege Respondent has taken. Claimants' entire claim is based on the loss of economic profitability; they point to issue volumes and market share as the interests of which they were deprived. None of these rights are cognizable under Hungarian law and, accordingly, the expropriation claim must fail.[385] Claimants do not allege that tangible aspects of their business were expropriated. All such assets remain in Claimants' ownership and control. The only right that Claimants actually allege is a "*right to expect stability*."[386] Even if this right – like the right to access a market – had been violated, it is not a right capable of expropriation because it is not a right "*capable of ownership, valuation and alienation*."[387]

International Investment Arbitration: Substantive Principles (Oxford University Press 2007) § 8.65 **[RLA-0100]**; M. Sornarajah, The International Law on Foreign Investment (3d ed. 2004) 357 **[RLA-0107]**.

[384] R-II § 212; *RosInvest v. Russia*, § 607 **[CLA-0099]**; *ST-AD GmbH v. The Republic of Bulgaria*, UNCITRAL, PCA Case No. 2011-06, Award on Jurisdiction (18 July 2013) § 282 **[RLA-0064]**.

[385] R-II § 209; R-I § 171.

[386] R-I § 173.

[387] *Id*., at §§ 170 – 173; R-II § 213; Campbell McLachlan QC, Laurence Shore and Mathew Weiniger, International Investment Arbitration: Substantive Principles (Oxford University Press 2007) **[RLA-0100]**; *Bayindir v. Pakistan*, § 442 **[RLA-0013]**; *Emmis v. Hungary* Award, §§ 192, 253 **[RLA-0027]**; *Emmis v. Hungary* Decision on 41(5), § 173 **[RLA-0029]**; *Generation Ukraine v. Ukraine*, § 8.8 **[CLA-0038]** / **[RLA-0032]**; Zachary Douglas, *Property, Investment, and the Scope of Investment Protection Obligations*, in The Foundations of International Investment Law (Zachary Douglas et al. eds. 2014) 377 **[RLA-0096]**; *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award (2 October 2006) [hereinafter "*ADC v. Hungary*"] **[CLA-0030]** / **[RLA-0004]** (contract rights); *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company Ltd. v. The Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award (7 October 2003) [hereinafter "*AIG v. Kazakhstan*"] **[CLA-0037]** / **[RLA-0006]** (real property rights); *Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award (22 April 2009) [hereinafter "*Funnekotter v. Zimbabwe*"] **[CLA-0043]** (real property rights); *Biwater Gauff (Tanzania) LTD, v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008) [hereinafter "*Biwater v. Tanzania*"] **[CLA-0017]** / **[RLA-0016]** (lease contract rights); *Burlington v. Ecuador* Decision on Liability **[CLA-0008]** / **[RLA-0017]** (contract rights); *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL Partial Award (13 September 2001) [hereinafter "*CME v. Czech Republic* Partial Award"], **[CLA-0023]** (license rights); *Compañía De Aguas del Aconquija S.A. And Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (20 August 2007) [hereinafter "*Vivendi v. Argentina*"] **[CLA-0021]** / **[RLA-0021]** (contract rights); *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits (3 September 2013) [hereinafter "*Conoco v. Venezuela*"] **[CLA-0044]** / **[RLA-0022]** (ownership interest); *M. Meerapfel Söhne AG v. République Centrafricaine*, ICSID Case No. ARB/07/10, Award (12 May 2011) [hereinafter "*Söhne v. CAR*"] **[CLA-0011]** (ownership interest); *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1,

298. Claimants argue that the value of their company was expropriated *vis-à-vis* a diminution in the value of their potential future profit. For future profit claims to be successful, there must be a demonstrable property interest in those future earnings.[388] Here, it is undisputed that Claimants had no contract or any other type of commitment that guaranteed them a particular volume of business or access to a certain market for a pre-determined period of operation. That Claimants' future operations had value to them does not make it a property right.[389]

299. Likewise, Claimants cannot assert a right to a particular tax or regulatory system, as the BIT contains no stabilization clause and Respondent never committed that it would never change the voucher system. Indeed, Respondent regularly reviewed and modified the voucher system, changed the exemption cap, and introduced new vouchers, and Claimants routinely switched their product-mix, as well as their sales force and market strategy, to take advantage of these changes.[390] Rather than continue to adjust and diversify, Claimants decided to suspend operations and claim that the Government deprived them of "*business activity*", "*profits*", or "*market*." No vested right, however, has been violated by the State. [391] Claimants' argument that they had assets and know-how that were tailored to particular market should be rejected. Claimants' only business was made possible as an indirect consequence of Respondent's efforts to provide social benefits to its citizens. Claimants had no reasonable expectation that the tax advantages that they

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Award (30 August 2000) [hereinafter "*Metalclad v. Mexico*"] **[CLA-0016] / [RLA-0043]** (operation rights); *Mobil Corporation, Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd., and Mobil Venezolana de Petróleos, Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award (9 October 2014) [hereinafter "*Mobil v. Venezuela*"], **[RLA-0046]** (ownership interest); *Saar Papier Vertriebs GmbH v. Poland*, UNCITRAL, Award (16 October 1995) **[RLA-0057]** (operation rights); *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award (6 February 2007) [hereinafter "*Siemens v. Argentina*"] **[CLA-0028] / [RLA-0063]** (contract rights); *Starrett Housing and others v. The Republic of Iran and others*, IUSCT Case No° 24 (ITL 32-24-1), Interlocutory Award, 16 Iran- U.S.C.T.R. 112 (1983) [hereinafter "*Starrett v. Iran*"], **[RLA-0065]** (ownership and contract rights); *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (29 May 2003) [hereinafter "*Tecmed v. Mexico*"] **[CLA-0022] / [RLA-0068]** (operation right); *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award (1 June 2009) [hereinafter "*Siag v. Egypt*"] **[CLA-0040]** (real property and contract rights).

[388] R-I § 174; *Merrill & Ring v. Canada*, §§ 142, 149 **[RLA-0042]**.

[389] R-I § 175; R-II §§ 214 – 215; *Merrill & Ring v. Canada*, §§ 127, 129, 142, 149 **[RLA-0042]**; Zachary Douglas, *Property, Investment, and the Scope of Investment Protection Obligations*, in The Foundations of International Investment Law (Zachary Douglas et al. eds. 2014) 377 **[RLA-0096]**.

[390] R-I § 176; R-II § 218; FTI First Report § 3.6 **[CEX-1]**.

[391] R-II §§ 218 – 220; Dér Statement, §§ 10 – 12, 35, 37 **[CWS-1]**; Second FTI Report, 4.51, 5.41 **[CEX-2]**; *Oscar Chinn Case (U.K. v. Belg.)*, 1934 P.C.I.J. (ser. A/B) No. 63 (12 December 1934) [hereinafter "Oscar Chinn Case"] **[RLA-0166]**.

had been able to profitably exploit would remain unchanged.[392]

300. The *Merrill Ring v. Canada* holding, while not concerning the "*expropriation of a shareholding*" involves the same type of claim that Claimants advance here. There, the claimant alleged that Canada had taken the claimant's business and argued that its investment included an interest in realizing a fair market value of its product. The tribunal rejected that claim, as that claimant did not have a demonstrable property interest in those future earnings.[393] The tribunal in *Methanex v. USA* and the PCIJ in the *Oscar Chinn* case reached similar conclusions.[394]

301. At the Hearing, Respondent noted that it was not the case that CD Hungary had a right to issue a voucher in any particular year. Rather, they and many different entities simply had the opportunity to do so.[395]

(c) Tribunal Considerations and Conclusions

302. The Tribunal recalls that, in its Decision on Jurisdiction, it concluded that, pursuant to Art. 1 of the BIT, Claimants' shareholding in CD Hungary constitutes an "*investment*" and Claimants fall within the definition of "*investor*."[396]

303. Respondent does not dispute that Claimants have an investment – their shareholding – for the purposes of asserting jurisdiction. In its view, however, the existence of this right is irrelevant

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[392] R-I § 177; R-II § 218; *Generation Ukraine v. Ukraine*, § 22.1 **[CLA-0038]** / **[RLA-0032]**; Oscar Chinn Case **[RLA-0166]**; First FTI Report, § 3.6 **[CEX-1]**.

[393] R-II § 215; *Merrill & Ring v. Canada*, §§ 127, 129, 149 **[RLA-0042]**.

[394] R-II §§ 216 – 217; *Marvin Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (16 December 2002) [hereinafter "*Marvin Feldman v. Mexico*"], § 211 [**CLA-0013]** / **[RLA-0041]**; Oscar Chinn Case **[RLA-0166]**; Gillian White, Nationalisation of Foreign Property, Ch. 3 (Stevens & Sons Ltd. 1961) **[RLA-0238]**.

[395] Tr. Day 4 at 53:8 – 12 (R. Closing).

[396] Article 1 of the France-Hungary BIT, CLA-0001 / RLA-0079, provides in relevant part as follows:

> 1. *The term 'investment' shall apply to assets such as property, rights and interests of any category, related to economic activity in any sector whatever, established after 31 December 1972, in accordance with the legislation of the Contracting Party in whose territory or maritime zones the investment was made, and particularly but not exclusively, to:* […] *(b) Shares and other forms of participation, albeit minority or indirect, in companies constituted in the territory of either Party;*
>
> […]
>
> 2. *The term 'investor' shall apply to:* […] *(b) Any body corporate constituted in the territory of either Contracting Party in accordance with its legislation and having its registered office there* […]

because the shareholding is not what Claimants allege Respondent has taken. According to Respondent, Claimants' entire claim is based on the loss of economic profitability.

304. The Tribunal cannot accept that view. Claimants do not submit that Respondent expropriated a right to expect stability or future profits or a right to a particular tax or regulatory system. Rather, Claimants submit that Respondent indirectly expropriated their shareholding in CD Hungary by dispossessing them of the economic value of the shareholding as it existed before the 2011 Reform.

305. Even if shares remain legally held by a claimant, if a State's measures result in the loss of the shares' economic value, this may be considered an indirect expropriation. This is confirmed by a wide body of jurisprudence such as the awards in *RosInvest*,[397] *Burlington Resources*,[398] and others.[399] The *Metalclad* tribunal defined indirect expropriation as an interference which has the effect of depriving the owner "*of the use or reasonably-to-be-expected economic benefit of property[.]*"[400] It has further been established that such a loss of value must be substantial and sufficiently permanent, though a substantial deprivation alone will suffice.[401]

306. Whether these conditions were fulfilled in the present case will have to be examined by the Tribunal hereafter.

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397 *RosInvest v. Russia*, § 574, 608 **[CLA-0099]**. Andrew Newcombe and Lluis Paradell, Law and Practice of Investment Treaties: Standards of Treatment, 1st Edition, Kluwer Law International, 2009, 289, 304 **[CLA-0064]**.

398 *Burlington v. Ecuador* Decision on Liability, § 397 **[CLA-0008] / [RLA-0017]**.

399 *CME v. Czech Republic* Partial Award, § 604 **[CLA-0023]**; *Antoine Goetz and others v. Republic of Burundi*, ICSID Case No. ARB/95/3, Award (10 February 1999) [hereinafter "*Goetz I* Award"], § 124 **[CLA-0213]**; *Compañia del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award (17 February 2000) [hereinafter "*Desarrollo v. Costa Rica*"], §§ 76 – 77 **[CLA-0215]**.

400 C-I § 248; C-II §§ 196, 199; *Metalclad v. Mexico*, § 103 **[CLA-0016] / [RLA-0043]**; *Generation Ukraine v. Ukraine*, § 20.29 **[CLA-0038] / [RLA-0032]**; *Goetz I* Award, § 124 **[CLA-0213]**; *Consortium RFCC v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Award (22 December 2003) [hereinafter "*RFCC v. Monocco*"], §§ 68 – 69 **[CLA-0214]**; *LG&E v. Argentina* Decision on Liability, § 190 **[CLA-0041] / [RLA-0038]**.

401 C-I § 253; C-II § 200, *Pope & Talbot Inc and The Government of Canada*, UNCITRAL, Interim Award (26 June 2000) [hereinafter "*Pope & Talbot v. Canada* Interim Award"], §§ 101 – 102 **[CLA-0014]**; Andrew Newcombe and Lluis Paradell, Law and Practice of Investment Treaties: Standards of Treatment, 1st Edition, Kluwer Law International, 2009, 345-346 **[CLA-0018]**; *EnCana v. Ecuador*, § 174 **[CLA-0019] / [RLA-0158]**; *Tecmed v. Mexico*, § 116 **[CLA-0022] / [RLA-0068]**; *CME v. Czech Republic* Partial Award, § 604 **[CLA-0023]**; *LG&E v. Argentina* Decision on Liability, § 200 **[CLA-0041] / [RLA-0038]**; *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award (14 July 2006) [hereinafter "*Azurix v. Argentina*"], § 313 **[CLA-0092] / [RLA-0012]**; *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award (8 November 2010) [hereinafter "*Alpha v. Ukraine*"], § 410 **[CLA-0103]**; *Chemtura v. Canada*, § 249 **[RLA-0018]**.

2. Indirect Expropriation / The Existence of a Substantial Dispossession

(a) Claimants' Arguments

307. Expropriation under international law requires an investor to have been substantially deprived of the economic value of or – alternatively – of the use, management or control of its investment. Thus, an expropriation may happen "*indirectly*", *i.e.* without a formal transfer of property. The determinative factor is whether the investor has been "*substantially deprived*" of its investment. As reflected in Art. 5(2) of the BIT, an assessment of the effect of the relevant measures – as opposed to the State's intention – is critical.[402] When assessing evidence of an indirect expropriation, decisive consideration must be given to the effects of the measure in question (the "*sole effects*" test).[403]

308. The term "*dispossession*" as used in Art. 5(2) of the BIT is functionally equivalent to "*expropriation*" and, therefore, Art. 5(2) should be read as codifying the customary international law definition of expropriation.[404] Respondent's argument that there is a distinction between "*dispossession*" and "*expropriation*" suffers from four flaws. First, the issue in this case is whether the 2011 Reform rendered it impossible for Claimants to make economic use of their

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[402] C-I §§ 249 – 250, 262 – 265; C-II §§ 192 – 198; R-I § 210; *Burlington v. Ecuador* Decision on Liability, §§ 396, 401 **[CLA-0008]** / **[RLA-0017]**; *Pope & Talbot v. Canada* Interim Award, §§ 101 – 102 **[CLA-0014]**; *Biwater v. Tanzania*, § 452 **[CLA-0017]** / **[RLA-0016]**; Andrew Newcombe and Lluis Paradell, Law and Practice of Investment Treaties: Standards of Treatment, 1st Edition, Kluwer Law International, 2009, 345-346 **[CLA-0018]**; *EnCana v. Ecuador*, § 174 **[CLA-0019]** / **[RLA-0158]**; Campbell McLachlan, Laurence Shore, and Matthew Weiniger, International Investment Arbitration Substantive Principles, 1st Edition, Oxford University Press, 2007, § 8.88 **[CLA-0020]**; *Vivendi v. Argentina*, §§ 7.5.10 – 7.5.11, 7.5.20 **[CLA-0021]** / **[RLA-0021]**; *Tecnicas Medioambientales* § 116 **[CLA-0022]** / **[RLA-0068]**; *CME v. Czech Republic* Partial Award, § 604 **[CLA-0023]**; *Starrett v. Iran*, 154 **[RLA-0065]**; *Siemens v. Argentina*, § 270 **[CLA-0028]** / **[RLA-0063]**; *Fireman's Fund Insurance Company v. The United Mexican States*, ICSID Case No. ARB(AF)/02/1, Award (17 July 2006) [hereinafter "*Fireman's Fund v. Mexico*"], § 176(f) **[CLA-0029]**; *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/05, Award (21 November 2007) [hereinafter "*ADM v. Mexico*"], §§ 241 – 242 **[CLA-0032]**; *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award (12 May 2005) [hereinafter "*CMS Gas v. Argentina* Award"], § 261 **[CLA-0036]**; *Generation Ukraine v. Ukraine*, § 20.29 **[CLA-0038]** / **[RLA-0032]**; *RosInvest v. Russia*, §§ 623 – 624 **[CLA-0099]**; Expropriation, UNCTAD Series on Issues in International Investment Agreements II, United Nations Conference on Trade and Development, 2012, xi **[CLA-0210]**; *Tippetts, Abbett, McCarthy, Stratton v. Tams-Affa* (IUSCT), Case No. 7, Award, 6 IUSCTR 219 (22 June 1984) 226 **[CLA-0211]**; Draft Convention on the protection of foreign property, Text with Notes and Comments, OECD (16 October 1967) **[CLA-0212]**; *Bayindir v. Pakistan*, § 443 **[RLA-0013]**.

[403] C-I § 262; *Burlington v. Ecuador* Decision on Liability, § 396 **[CLA-0008]** / **[RLA-0017]**.

[404] C-I § 244; International Investment Law: A Changing Landscape, a Companion Volume to International Investment Perspectives, Chapter 2 "Indirect Expropriation and The Right to Regulate" in International Investment Law, OECD, 2005, 49 **[CLA-0010]**; *Söhne v. CAR*, § 300 **[CLA-0011]**.

investment, thereby destroying its value. The issue is not whether the loss is compensable.[405] Second, interpreting the term "*dispossession*" in accordance with its ordinary meaning and the other terms in the BIT, as required by Art. 31 of the VCLT, shows that it is synonymous with "*expropriation*." Another interpretation whereby dispossession and expropriation were not synonymous would lead to impractical results which, while theoretically possible, would be contrary to the BIT's object and purpose of promoting and protecting investments.[406] The preparatory work related to the conclusion of the BIT also indicates that the terms – in French and in Hungarian – are synonyms with the same ordinary meaning.[407] Third, Respondent's assumption that "*dispossession, as it pertains to French treaties*" must be given special meaning is unjustified. Rather, the terms of French treaties make it clear that the opposite is true.[408] Fourth, unlike in *Total* where the tribunal erroneously interpreted the term "*dispossession*", the *Vivendi* tribunal made it clear that a reference to "*dispossession*" does not alter the applicable legal standard. Rather, "*dispossession*" as described therein is the customary international law standard

[405] C-II §§ 169 – 171; R-I §§ 205 – 206.

[406] C-II §§ 172 – 175; France-Hungary BIT **[CLA-0001]** / **[RLA-0079]**; United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations Treaty Series, vol. 1155, 331, Art. 31 **[CLA-0052]**; Richard K. Gardiner, *Treaty Interpretation* (2d ed. 2015) 36 **[RLA-0136]**.

[407] C-II §§ 176 – 178; France-Hungary BIT **[CLA-0001]** / **[RLA-0079]**; Report on the negotiations relating to the Hungarian-French investment protection agreement, prepared for the Ministry of Finance of the Government of the People's Republic of Hungary on 7 July 1986 2 **[RLA-0092]**; Memorandum from the Ministry of Foreign Affairs regarding the Agreement with Hungary on the Reciprocal Promotion and Protection of Investments, Negotiations of 1-2 July, Paris, dated 8 July 1986 2 **[RLA-0130]**; Outgoing Telegram from the Ministry of Foreign Affairs regarding Negotiations on the French-Hungarian Agreement on the Reciprocal Promotion and Protection of Investments, dated 11 July 1986 **[RLA-0131]**; Memorandum from the Directorate for European Affairs regarding the French-Hungarian Agreement on the Reciprocal Promotion and Protection of Investments, dated 19 December 1986 **[RLA-0132]**; Decision on Jurisdiction § 146.

[408] C-II §§ 179 – 186; R-I § 206; France and Malta Agreement concerning the reciprocal encouragement and protection of investments (with protocol), signed 11 August 1976 (Effective 1 January 1978) **[CLA-0200]**; Agreement between the Government of the French Republic and the Government of the People's Republic of China on the reciprocal promotion and protection of investments (with annex),signed 30 May 1984, in force as of 1 March 1985 (no longer in force) **[CLA-0201]**; Agreement between the Government of the French Republic and the Government of the People's Republic of China concerning the encouragement and reciprocal protection of investments, signed 26 November 2007 (Effective 20 August 2010) **[CLA-0202]**; Agreement between the Government of the Federal Republic of Ethiopia and the Government of the Republic of France for the reciprocal promotion and protection of investments, signed 25 June 2003 (Effective 7 August 2004) **[CLA-0203]**; Richard Gardiner, Treaty Interpretation, 2nd Edition, The Oxford International Law Library, 2015, 200-202 **[CLA-0204]**; Agreement between the Government of the French Republic and the Government of the Lebanese Republic on the reciprocal promotion and protection of investments, signed 28 November 1996 (Effective 29 November 1999) **[CLA-0205]**; Agreement between the Government of Jamaica and the Government of the Republic of France on the reciprocal promotion and protection of investments, signed 25 January 1993 (Effective 15 September 1994) **[CLA-0206]**; Arnaud De Nanteuil, *L'expropriation indirecte en droit international de l'investissement*, Editions A. Pedone, 2014, 95 **[CLA-0207]**; Dominique Carreau et Patrick Juillard, *Droit International Economique*, 1ère édition, 2003, § 1376 **[CLA-0208]**; *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability (27 December 2010) [hereinafter "*Total v. Argentina*, Decision on Liability"], § 194 **[RLA-0070]**.

of "*substantial deprivation.*"[409] Article 5(2) of the BIT, therefore, protects an investor from suffering a substantial deprivation of its investment.[410]

309. Reference to "*dispossession*" in Art. 5(2) of the BIT is equivalent to a reference to indirect expropriation. Thus, Claimants are not required to show that they have lost control of their company. Rather, they show that Respondent deprived them of the economic value of their investment. Under Art. 5(2), "*control*" must be understood in the economic sense – *i.e.*, that Claimants have been substantially deprived of the economic value of their investment and have been stripped of their ability to make economic use of it.[411] The concept of "*control*" is meaningless unless it includes the ability of an investor to continue to operate its investment economically.[412] Respondent's focus on "*control*" is wrong as a matter of international law.[413] Although Claimant CD Internationale continues to hold 100% of the shareholding in CD Hungary, Claimants have nonetheless been substantially deprived of their investment, and this constitutes a taking under Art. 5(2) of the BIT.[414]

310. There is ample international legal support for Claimants' position that by destroying CD Hungary's economic value and viability, Respondent deprived Claimants of their investment.[415] Past awards offer useful, though non-dispositive guidance as to what constitutes an indirect expropriation. It is recognized that tax measures can have the effect of an indirect

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[409] C-II §§ 189 – 190; R-I § 206; *Vivendi v. Argentina*, § 7.5.24 **[CLA-0021]** / **[RLA-0021]**; *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. The United Mexican* States, ICSID Case No. ARB(AF)/04/3, Award (16 June 2010) [hereinafter "*Gemplus v. Mexico*"] **[CLA-0093]**.

[410] C-I § 244; C-II §§ 187 – 191; International Investment Law: A Changing Landscape, a Companion Volume to International Investment Perspectives, Chapter 2 "Indirect Expropriation and The Right to Regulate" in International Investment Law, OECD, 2005, 49 **[CLA-0010]**; *Söhne v. CAR*, § 300 **[CLA-0011]**; *Vivendi v. Argentina*, § 7.5.24 **[CLA-0021]** / **[RLA-0021]**; United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations Treaty Series, vol. 1155, 331, Art. 31 **[CLA-0052]**; *Gemplus v. Mexico* **[CLA-0093]**; Expropriation, UNCTAD Series on Issues in International Investment Agreements II, United Nations Conference on Trade and Development, 2012, 5 **[CLA-0209]**; *Total v. Argentina*, Decision on Liability, § 194 **[RLA-0070]**.

[411] C-II §§ 207 – 208, 210; *EnCana v. Ecuador*, § 174 **[CLA-0019]** / **[RLA-0158]**; *Alpha v. Ukraine*, § 410 **[CLA-0103]**; *Goetz I* Award, § 124 **[CLA-0213]**; *Generation Ukraine v. Ukraine*, § 191 **[CLA-0038]** / **[RLA-0032]**.

[412] C-I §§ 254 – 255; *Tecmed v. Mexico*, § 115 **[CLA-0022]** / **[RLA-0068]**; *S.D. Myers, Inc. v. Government of Canada*, NAFTA, Partial Award (13 November 2000) [hereinafter "*S.D. Myers v. Canada* Partial Award"], § 283 **[CLA-0027]**.

[413] C-II § 193.

[414] *Id.*, at § 205; C-I § 246.

[415] C-I § 253; C-II §§ 214 – 215; *Burlington v. Ecuador* Decision on Liability, § 397 **[CLA-0008]** / **[RLA-0017]**; *CME v. Czech Republic* Partial Award, § 604 **[CLA-0023]**; *Goetz I* Award, § 124 **[CLA-0213]**; *Desarrollo v. Costa Rica*, §§ 76 – 77 **[CLA-0215]**.

expropriation.[416] Expanding on this and considering a deprivation of expected economic benefits, the *Metalclad* tribunal defined indirect expropriation as an interference which has the effect of depriving the owner "*of the use or reasonably-to-be-expected economic benefit of property*[.]"[417] Such a loss of value must be substantial and sufficiently permanent, though a substantial deprivation alone will suffice.[418]

311. The economic value of an investment is central to the assessment of a substantial deprivation of the "*ability to manage, use or control*" the investment in a meaningful way. Construed widely so as to include the investor's ability to operate its investment economically, the *Tecmed* tribunal considered whether, due to State actions, "*the assets involved have lost their value or economic use for their holder*[.]"[419] Similarly, the tribunal in *Santa Elena* noted that control of a property included the ability for "*the owner reasonably to exploit the economic potential of the property*."[420] Scholar de Nanteuil also observed, with regard to property affected by "*dispossession*", that indirect expropriation is acknowledged because of the property's use as a tool for generating profit.[421]

312. Claimants explain that, "*[b]y (i) creating a State monopoly through the Erzsébet voucher, (ii) introducing the SZÉP card* [with a sustained publicity campaign] *and imposing conditions for its issuance that excluded CD Hungary (and other Non-Hungarian Issuers), and (iii) instituting a discriminatory tax framework that favoured Beneficiaries and penalized CD Hungary, the Respondent transformed the environment and conditions under which CD Hungary carried on its*

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416 C-I § 247; *Marvin Feldman v. Mexico*, § 101 **[CLA-0013]** / **[RLA-0041]**.

417 *Id*., at § 248; C-II §§ 196, 199; *Metalclad v. Mexico*, § 103 **[CLA-0016]** / **[RLA-0043]**; *Generation Ukraine v. Ukraine*, § 20.29 **[CLA-0038]** / **[RLA-0032]**; *Goetz I* Award, § 124 **[CLA-0213]**; *RFCC v. Monocco*, §§ 68 – 69 **[CLA-0214]**; *LG&E v. Argentina* Decision on Liability, § 190 **[CLA-0041]** / **[RLA-0038]**.

418 C-I § 253; C-II § 200, *Pope & Talbot v. Canada* Interim Award, §§ 101 – 102 **[CLA-0014]**; Andrew Newcombe and Lluis Paradell, Law and Practice of Investment Treaties: Standards of Treatment, 1st Edition, Kluwer Law International, 2009, 345-346 **[CLA-0018]**; *EnCana v. Ecuador*, § 174 **[CLA-0019]** / **[RLA-0158]**; *Tecmed v. Mexico*, § 116 **[CLA-0022]** / **[RLA-0068]**; *CME v. Czech Republic* Partial Award, § 604 **[CLA-0023]**; *LG&E v. Argentina* Decision on Liability, § 200 **[CLA-0041]** / **[RLA-0038]**; *Azurix v. Argentina*, § 313 **[CLA-0092]** / **[RLA-0012]**; *Alpha v. Ukraine*, § 410 **[CLA-0103]**; *Chemtura v. Canada*, § 249 **[RLA-0018]**.

419 C-II § 201; *see also* C-I §§ 251 – 252; *Burlington v. Ecuador* Decision on Liability, § 397 **[CLA-0008]** / **[RLA-0017]**; *Vivendi v. Argentina*, § 7.5.34 **[CLA-0021]** / **[RLA-0021]**; *Tecmed v. Mexico*, §§ 115 -116 **[CLA-0022]** / **[RLA-0068]**; *CME v. Czech Republic* Partial Award, § 604 **[CLA-0023]**; *S.D. Myers v. Canada* Partial Award, § 283 **[CLA -0027]**; Expropriation, UNCTAD Series on Issues in International Investment Agreements II, United Nations Conference on Trade and Development, 2012, xi **[CLA-0210]**.

420 C-II § 202; *Desarrollo v. Costa Rica*, § 76 **[CLA-0215]**.

421 C-II § 203; Arnaud De Nanteuil, *L'expropriation indirecte en droit international de l'investissement*, Editions A. Pedone, 2014, 109-115 **[CLA-0216]**.

business."[422] The impact was instant and disastrous, leading to (1) an immediate, devastating and permanent decrease in CD Hungary's activities, (2) a catastrophic loss in market share, and (3) an end to CD Hungary's economic viability.[423] The present dispute must be distinguished from cases where an investor continues to operate but merely experienced a reduction in profitability. The 2011 Reform did not reduce CD Hungary's profitability; it destroyed it and reduced CD Hungary to a company with assets but without business.[424] CD Hungary exists only on paper and has 2 employees, one who is on maternity leave and cannot be made redundant, and one who runs Claimants' operations in Poland.[425] Meal vouchers accounted for 97% of CD Hungary's issue volume by value in 2011. Excluding CD Hungary from the meal voucher market struck at the economic heart of Claimants' investment, bringing CD Hungary to a standstill.[426] By destroying CD Hungary's economic value and viability, Respondent substantially deprived Claimants of their investment.[427] Respondent has made its refusal to amend the 2011 Reform clear and has shown no willingness to amend the conditions for issuing the SZÉP Card.[428]

313. Although intentions are not determinative, where a State intended to carry out an expropriation, this will only lend support to a claimant's position. Here, Respondent's intention to expropriate Claimants' investment was clear in the relevant legal texts and in the contemporaneous statements of politicians, who confirmed the intention of removing all foreign competition from the meal voucher market.[429] For example, on 12 December 2011, the Dr. Bence Rétvári (Secretary of State

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[422] C-II § 212; C-I §§ 256 – 257; Summary table, "Le Chèque Déjeuner Kft. 1997-2012" **[C-0057]**; Edenred, Sodexo, Chèque Déjeuner press release "Reform of the restaurant voucher in Hungary" (2012) **[C-0071]**; Extract from Internal CD Hungary presentation (2013) **[C-0122]**; Legrand Statement, § 39 **[CWS-3]**.

[423] C-II §§ 211 – 213, *see also* C-I §§ 256, 258 – 259; C-II §§ 217 – 218; Summary table, "Le Chèque Déjeuner Kft. 1997-2012" **[C-0057]**; Edenred, Sodexo, Chèque Déjeuner press release "Reform of the restaurant voucher in Hungary" (2012) **[C-0071]**; Extract from Internal CD Hungary presentation (2013) **[C-0122]**; Legrand Statement, § 39 **[CWS-3]**; "Responsibility of States for Internationally Wrongful Acts", 53 UN GAOR Supp. (No. 10) at 43, UN Doc. A/56/83 (2001**) [CLA-0080]**.

[424] C-II §§ 209, 211; *LG&E v. Argentina* Decision on Liability, § 191 **[CLA-0041] / [RLA-0038]**; *EnCana v. Ecuador*, § 174 **[CLA-0019] / [RLA-0158]**; *CME v. Czech Republic* Partial Award, § 591 **[CLA-0023]**.

[425] C-I § 261.

[426] *Id*., at § 260; Extract from Mazars Summary Notes on CD Hungary, "Le Chèque Déjeuner Kft., Hungary", dated 31 December 2009, 31 December 2010, and 31 December 2011 – 31 December 2013 **[C-0044]**; *EnCana v. Ecuador*, § 174 **[CLA-0019] / [RLA-0158]**; *Vivendi v. Argentina*, § 7.2.25 **[CLA-0021] / [RLA-0021]**.

[427] C-II § 214; *Desarrollo v. Costa Rica*, § 77 **[CLA-0215]**.

[428] C-I §§ 259, 261; PIT Summary Table (1996-2014) **[C-0046]**; Minutes of the meeting between the Non-Hungarian Issuers and Respondent, 3, 5, 7, 8 (28 August 2012) 3, 5, 7, 8 **[C-0112]**.

[429] C-I §§ 264 – 269; Dr. Bence Rétvári (State Secretary of the KIM), Speech at the Parliament No 152/90 (12 December 2011) **[C-0119]**; *Burlington v. Ecuador* Decision on Liability, § 400 **[CLA-0008] / [RLA-0017]**; *Vivendi v. Argentina*, § 7.5.20 **[CLA-0021] / [RLA-0021]**; *Fireman's Fund v. Mexico* **[CLA-0029]**; First Nagy Statement, § 52 **[CWS-2]**.

of the KIM) noted that the 2011 Reform would enable "*100% of the profit* [to] *stay in Hungary*[.]"[430] In January 2012, this sentiment was reiterated by another Hungarian politician, Mr. Soltész, when he stated that "*the reforms were intended to exclude the Non-Hungarian Issuers from the voucher market*."[431] The obvious effect of the discriminatory tax treatment was a reduction in Claimants' business. Indeed, that is unsurprising, given that that was the only possible outcome of the 2011 Reform.[432]

(b) Respondent's Arguments

314. Claimants' argument that any substantial deprivation results in an indirect expropriation is both incomplete and incorrect. Legitimate exercises of a government's regulatory authority are not expropriatory, regardless of the alleged deprivation or loss. Adopting the broad formulation proposed by Claimants would be contrary to customary international law and its application through the relevant arbitral jurisprudence, which recognize that governments must be free to act in the public interest, in particular through new or modified tax regimes or the granting or withdrawal of government subsidies.[433]

315. In its post-hearing submission, Respondent stated that the application of the sole effects test to the present circumstances would mark a significant departure from the relevant jurisprudence.[434] The "*sole-effects test*" is not applicable when generally applicable, non-discriminatory tax measures are at issue.[435] Cases relied upon by Claimants for the "*sole effects*" test, through non-precedential and not concerning general measures, reaffirm that general regulatory measures are subject to a different standard.[436] Both *Starrett Housing* and *Tippets* involved a taking resulting from the imposition and subsequent actions of a government appointed manager who impeded

[430] C-I § 270; Dr. Bence Rétvári (State Secretary of the KIM), Speech at the Parliament No 152/90 (12 December 2011) **[C-0119]**.

[431] C-I § 271; Respondent press release, "The Government Launches Social Holidays Programme" (12 January 2012) **[C-0083]**; First Nagy Statement, § 49 **[CWS-2]**.

[432] C-I § 272.

[433] R-I §§ 168 – 169; *Saluka v. Czech Republic*, § 260 **[CLA-0049] / [RLA-0059]**; *Marvin Feldman v. Mexico*, § 103 [**CLA-0013] / [RLA-0041]**.

[434] RPHB-I § 3.

[435] R-II § 114.

[436] R-II § 114; *ADM v. Mexico*, § 241 **[CLA-0032]**.

the daily operations and interfered with the claimant's control of the underlying investment.[437] Where the Iran-U.S. Claims Tribunal decided cases outside of the context involved in *Starrett Housing* and *Tippets* and involving measures of general application, that tribunal recognized the police powers doctrine. In *Emanuel Too v. Greater Modesto Insurance Associates*, the tribunal explained that "*a State is not responsible for … economic disadvantage resulting from bona fide general taxation ... provided it is not discriminatory[.]*"[438]

316. Respondent cannot be in breach of the BIT because the BIT prohibits "*dispossession*" and not "*expropriation*."[439] By definition, "*dispossession*" places a higher burden on Claimants. For indirect expropriation as alleged by Claimants, the intent is to provide compensation only for those acts which cause the investor to be dispossessed of its ownership (*i.e.*, title or use/right of possession) and not a loss of economic value.[440] Claimants remain in control of their shares and were free to manage the operations of CD Hungary as they saw fit. None of their assets or offices were seized and they were free to sell vouchers, including their hot and cold meal vouchers, to new and existing clients. Their products still enjoyed tax advantages.[441] Here, however, Claimants complain about reduced profits and alleged lost opportunities to expand and maintain their market share.[442] Economic loss alone is not compensable under the BIT. Claimants cannot base an expropriation claim on the loss of value or capacity to earn a commercial return, but instead must show a loss of one of the attributes of ownership.[443]

317. Although largely similar to expropriation, "*dispossession*" is not a functional equivalent of expropriation, but rather is an element of expropriation.[444] In *Total v. Argentina*, it was described

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[437] R-II §§ 109 – 110; *Starrett v. Iran* **[RLA-0065]**; Ian Brownlie, Principles of Public International Law 509 (6th ed. 2003) **[RLA-0211]**; V. Heiskanen, *The Doctrine of Indirect Expropriation in Light of the Practice of the Iran-United States Claims Tribunal*, 3 Transnat'l Dispute Mgmt. (December 2006) **[RLA-0223]**.

[438] R-II § 111; *Emanuel Too v. Greater Modesto Insurance*, 23 Iran-U.S. Cl. Tr. Rep. 378 (1989) **[RLA-0157]**.

[439] R-I § 205; C-I § 343.

[440] R-II § 167; C-II § 300; Dominique Carreau et Patrick Juillard, *Droit International Economique,* 1ère édition, 2003, paras. 1376-1377 **[CLA-0208]**.

[441] R-I § 210; R-II § 188; RPHB-I § 5.

[442] R-II § 155; C-II § 155.

[443] R-I § 205; R-II § 173.

[444] R-I § 206; *Vivendi v. Argentina*, § 7.5.24 **[CLA-0021]** / **[RLA-0021]**; *SAUR International SA v. Republic of Argentina*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability (22 May 2014) (French) § 366 **[RLA-0061]**; *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability (30 July 2010) [hereinafter "*Suez v. Argentina* Decision on Liability"], § 133 **[RLA-0066]**.

as a term that was "*more restrictive*" than "*expropriation*."[445] Claimants acknowledge that the text of the BIT is to be interpreted as to its ordinary meaning.[446] Here, the BIT plainly refers to dispossession, the ordinary meaning of which relates to the taking of property, usually real property.[447] This was not an accidental choice of language – the signatories selected a term that has a specific meaning under civil law systems. The French Expropriation code distinguishes between the transfer of legal title and the taking of possession. Expropriation under French law requires both transfer of legal title and dispossession. The requirement to pay just compensation results not from the loss of property itself, but the loss of its material and physical attributes. That dispossession requires a loss of control is further evidenced by the law concerning the loss of property in the territory which used to be under French Protectorate.[448] Because dispossession requires a loss of possession, it necessarily contemplates a loss of material control and the ability to exercise the rights associated with ownership of the property.[449] Claimants' observation that Hungary and France failed to distinguish between "dispossession" and "expropriation" – even in the *travaux préparatoires* – does not militate in favor of a broader understanding of what is required to establish a claim under Art. 5(2).[450] The *travaux* confirm Hungary's position.

318. France's treaty practice with regard to expropriation clauses is consistent – the term "*dispossession*" as specifically referenced in the France-Hungary BIT is consistently referred to in 94 out of 96 of France's investment treaties that are in force.[451] Regarding the two outliers,

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445 R-I § 206; *Total v. Argentina* Decision on Liability, § 194 **[RLA-0070]**.

446 R-II § 156; Claimants' Reply on Objections to Jurisdiction, § 7; C-II § 172; France-Hungary BIT, Art. 5(2) **[CLA-0001]** / **[RLA-0079]**.

447 R-II §§ 157, 159; Black's Law Dictionary (9th ed. 2009), 540, 1211 **[RLA-0209]**; Jean Carbonnier, *Droit Civil 2 – Les Biens, Les Obligations* (PUF 2004) **[RLA-0212]**; Gérard Cornu, *Vocabulaire Juridique* (11th ed. 2000), 779 **[RLA-0213]**; Gérard Cornu, Dictionary of the Civil Code (Alain Levasseur and Marie-Eugénie Laporte-Legeais trans. 2014) **[RLA-0214]**; Jamel Djoudi, *Possession*, *Répertoire Dalloz de Droit Civil* (2013) § 4 **[RLA-0217]**.

448 R-II §§ 160 – 161; French Law °70-732 of 15 July 1970 **[RLA-0199]**; No. 00715, Conseil d'Etat [C.E.][Council of State] (1 October 1976) **[RLA-0201]**; Gérard Cornu, Dictionary of the Civil Code (Alain Levasseur and Marie-Eugénie Laporte-Legeais trans. 2014) **[RLA-0214]**; Christian Lavialle, *Expropriation et Dépossession*, Revue Française de Droit Administratif 1228 (2001) **[RLA-0227]**.

449 R-II §§ 158 – 159; Jean Carbonnier, *Droit Civil 2 – Les Biens, Les Obligations* (PUF 2004) **[RLA-0212]**; Gérard Cornu, Vocabulaire Juridique (11th ed. 2000), 779 **[RLA-0213]**; Gérard Cornu, Dictionary of the Civil Code (Alain Levasseur and Marie-Eugénie Laporte-Legeais trans. 2014) **[RLA-0214]**; Jamel Djoudi, *Possession*, *Répertoire Dalloz de Droit Civil* (2013) **[RLA-0217]**.

450 R-II § 169; C-II § 177; Claimants' Reply on Objections to Jurisdiction § 99.

451 R-II § 172; Memorandum from the Senate on behalf of the Ministry of Foreign Affairs concerning the draft bill authorizing the *Agreement between France and Bulgaria Concerning the Reciprocal Promotion and Protection of Investments* (26 October 1989) **[R-0045]**; Memorandum from the Senate on behalf of the Ministry

Claimants' analysis of the France-Malta BIT ignores that Malta and France concluded a further Protocol that specifically provides that "*measures of dispossession*" refers to measures with an effect equivalent to expropriation or nationalization.[452] Claimants' interpretation of "*expropriation*" and "*dispossession*" as synonyms would rob this Protocol of all purpose.[453] The France-China BIT does not mandate that an investor must have been dispossessed of its investment to be expropriated.[454]

319. French publicists, including Carreau and Julliard, as cited by Claimants, support a restrictive reading of the term "*dispossession*."[455] Tribunals charged with interpreting and applying French treaties containing a clause relating to "*dispossession*" interpret the term restrictively and deploy a "*control test*" to assess whether dispossession has occurred. The *Total* tribunal found that dispossession, thus, refers to "*loss of [factual] control*."[456] That tribunal rejected the dispossession claim upon finding that *Total* continued to have full ownership of its investment and was not precluded from exercising its rights as a shareholder.[457] Similarly, in *Suez*, the tribunal dismissed the expropriation claims, emphasizing that possession and therefore control of the investment by the investor remained unaffected.[458] Claimants have not meaningfully challenged the analysis in the *Total* and *Suez* awards.[459] The *Vivendi* award, on which Claimants rely, does not address the meaning of "*dispossession*."[460]

320. Claimants erred in their reliance on de Nanteuil, who explained that to determine what constitutes a measure of dispossession, the term "*control*" must be understood as the power to manage – *i.e.* the power to make decisions with regard to the administration and operation of the investment. He stressed that the core issue is not the investor's ability to obtain benefits, as economic risk is

of Foreign Affairs concerning the draft bill authorizing the *Agreement Between France and Islamic Republic of Iran Concerning the Reciprocal Promotion and Protection of Investments* (25 February 2004) **[R-0047]**.

452 R-II § 170; C-II § 179; Agreement between the Government of the Republic of France and the Government of the Republic of Malta for the Promotion and Protection of Investments, signed on 11 August 1976, entered into force 1 January 1978 **[RLA-0182]**.

453 *Id.*

454 R-II § 171.

455 *Id*., at § 166; Dominique Carreau et Patrick Juillard, *Droit International Economique*, 1ère édition, 2003, paras. 1376-1377 **[CLA-0208]**.

456 R-I § 207; R-II § 162; *Total v. Argentina*, Decision on Liability, § 193 **[RLA-0070]**.

457 R-I § 208; *Total v. Argentina*, Decision on Liability, § 191 **[RLA-0070]**.

458 R-I § 208; R-II § 163; *Suez v. Argentina* Decision on Liability, § 136 **[RLA-0066]**.

459 R-II § 164; C-II § 187; *Total v. Argentina*, Decision on Liability, § 194 **[RLA-0070]**.

460 R-II § 165.

not typically protected.[461]

321. Expropriation analysis does not, as Claimants insist, allow for the application of a test whereby a claimant would recover if it suffered a substantial deprivation of the ability to manage, use or control its property OR a deprivation of economic value or viability.[462] The full excerpt of Art. 3 of the Draft Convention Protection of Foreign Property shows that expropriation analysis focuses on outright deprivation and/or interference with use, stating that "*the taking of property, within the meaning of the Article, must result in a loss of title or substance – otherwise a claim will not lie*."[463] Tribunals have found that a claimant must prove that at least one of the essential components of property rights have disappeared for an expropriation to have occurred. As confirmed in the *Goetz v. Burundi II* case, "*a loss of value without a loss of control or loss of usefulness of the investment cannot be regarded as an indirect expropriation*."[464] Even the authorities cited by Claimants confirm that considerations of loss of value cannot be considered absent loss of control.[465]

322. In order to constitute an indirect expropriation, measures must interfere with property rights to such an extent that these rights are "*rendered so useless that they must be deemed to have been expropriated*" such that the measures must effectively destroy the economic benefit of the investment, resulting in the "*neutralization, radical deprivation, irretrievable loss, inability to use, enjoy or dispose of the property*" and/or "*that the property can no longer be put to reasonable*

[461] R-II § 168; C-II § 185; Arnaud De Nanteuil, *L'expropriation indirecte en droit international de l'investissement*, Editions A. Pedone, 2014, 109-115 **[CLA-0216]**.

[462] R-II §§ 173 – 174; C-II §§ 198, 214.

[463] R-II § 175; C-II n.316; Draft Convention on the protection of foreign property, Text with Notes and Comments, OECD (16 October 1967) **[CLA-0212]**.

[464] R-II §§ 176 – 177; *El Paso Energy Int'l Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Award (31 October 2011) [hereinafter "*El Paso v. Argentina*"] **[CLA-0025]** / **[RLA-0026]**; *Antoine Goetz & Others v. Republic of Burundi*, ICSID Case No. ARB/01/2, Award (21 June 2012) **[RLA-0145]**; *Charanne B.V. & Construction Investments S.A.R.L. v. Kingdom of Spain*, Arbitration No. 062/2012, Final Award (21 January 2016) **[RLA-0151]**; *Oxus Gold plc v. Republic of Uzbekistan*, UNCITRAL, Final Award (17 December 2015) **[RLA-0167]**.

[465] R-II §§ 178 – 180; C-II n. 316, 318, 320, 323, 333, 344; *Pope & Talbot v. Canada* Interim Award, §§ 101 – 102 **[CLA-0014]**; *S.D. Myers v. Canada* Partial Award, §§ 282, 286 – 287 **[CLA -0027]**; *ADM v. Mexico*, § 246 **[CLA-0032]**; *LG&E v. Argentina* Decision on Liability, §§ 199 – 200 **[CLA-0041]** / **[RLA-0038]**; *Alpha v. Ukraine*, § 406 **[CLA-0103]**; *Goetz I* Award, § 124 **[CLA-0213]**; *Mamidoil Jetoil Greek Petroleum Products Société S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award (30 March 2015) [hereinafter "*Mamidoil v. Albania*"], § 566 **[RLA-0164]**.

use or makes any form of exploitation of the property disappear."[466] The cases show a high burden that a claimant must satisfy, including showing the impossibility of operating the investment economically.[467]

323. The France-Hungary BIT will protect investors where State actions make it impossible to earn a commercial return.[468] Recognizing that a mere reduction in profitability will not support a claim, Claimants allege that the 2011 Reform did not reduce profitability – "*it destroyed it*."[469] Claimants have presented no evidence beyond conclusory accusations that operations were uneconomic or not economically viable.[470] Claimants have not proven their claim that their decrease in sales was permanent because the volume of vouchers issued in 2013 was just 5% of what it had been in January 2011. Claimants suspended the issuance of vouchers in mid-January 2013, which accounts for the decrease in volume in 2013. Claimants also fail to acknowledge that 35% of the customers that they lost in 2012 were lost for reasons having nothing to do with the 2011 Reform.[471] Finally, there is no evidence Respondent in any way forced Claimants to terminate their contracts with affiliates or otherwise quit the market – those were Claimants' election.[472]

324. One year of loss, however, does not speak to the long-term prospects of economic viability. Claimants admit that it took six years to establish a business in Hungary and that it is typical to struggle to assimilate to new market conditions, which includes experiencing losses. It may also be typical to experience short-term loss before being able to recalibrate and achieve profit.[473] The

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[466] R-II §§ 173, 183; *National Grid plc v. The Argentine Republic*, UNCITRAL, Award (3 November 2008) [hereinafter "*National Grid v. Argentina*"] **[CLA-0053]**; *Electrabel v. Hungary*, Decision on Jurisdiction **[CLA-0070]**; *Biwater v. Tanzania* **[CLA-0017]** / **[RLA-0016]**; *Starrett v. Iran* **[RLA-0065]**.

[467] R-II § 184; C-II §§ 202 – 203.

[468] R-II §§ 185 – 186; United Nations Conference on Trade and Development, *Expropriation*, UNCTAD Series on Issues in International Investment Agreements II, UNCTAD/DIAE/IA/2011/7, U.N. Sales No. E.12.II.D.7 (2012) [hereinafter "UNCTAD, *Expropriation* (2012)"] **[RLA-0239]**.

[469] R-II § 187; C-II §§ 209, 210; *Mamidoil v. Albania*, § 561 **[RLA-0164]**.

[470] R-II §§ 189 – 191; R-I §§ 85, 229; Claimants' Response to Request Nos. 10, 11, 12, 15; *Mamidoil v. Albania*, § 561 **[RLA-0164]**.

[471] R-II § 192; C-II § 212; C-I § 228; RPHB-I § 8, Tr. Day 2 at 86:24 (Nagy); First FTI Report, § 1.20 **[CEX-1]**; Second Navigant Report, n.206 **[REX-2]**; Presentation, Hungarian Branch Strategic Meeting, Le Chèque Déjeuner (27 March 2012), slide 34 **[R-0056]** / **[NAV-0066]**.

[472] R-II § 202.

[473] *Id.*, at § 195; SZÉP Card Proposal, 28 **[R-0008]**; *Burlington v. Ecuador* Decision on Liability, § 399 **[CLA-0008]** / **[RLA-0017]**; Legrand Statement, § 17 **[CWS-3]**.

limited documentation provided appears to recognize that losses were not likely to be indefinite.[474] While Mr. Legrand claims that CD Hungary was unable to diversify in the short-term, the documented strategic analysis instead suggests that diversification and the return of lost customers might be possible.[475] CD Hungary did not even attempt to adjust to new market conditions.[476] Instead, the record indicates that even as of 27 October 2012, Claimants preferred to take advantage of the BIT and the potential it offered for full reparation.[477] The BIT, however, is not intended to be an insurance policy, nor does it protect the investor from taking necessary measures to make their investment profitable.[478]

325. Tribunals deny claims where the impact of the impugned measures was only temporary.[479] The 2011 Reform was never intended or expected to be permanent.[480] Many aspects of the 2011 Reform and especially the tax rates were set forth in the PIT, a law that is reviewed and amended annually. Since the 2011 Reform, the Government expanded the use of some vouchers and began subsidizing new ones. These are opportunities that Claimants could have taken advantage of, had they not suspended operations.[481] The circumstances surrounding Claimants' decision to leave Hungary show that they also did not anticipate or understand the 2011 Reform or attendant losses to be permanent: they told their affiliates that they were "*suspending*" performance, not permanently leaving the market.[482]

326. Due to the recent legislative amendments undertaken in response to the CJEU proceeding, the circumstances giving rise to Claimants' expropriation claim no longer exist. The new structure

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[474] R-II § 196; Presentation, Hungarian Branch Strategic Meeting, Le Chèque Déjeuner (27 March 2012) **[R-0056] / [NAV-0066]**; First FTI Report, §§ 4.105, 4.108 **[CEX-1]**; Legrand Statement, § 35 **[CWS-3]**.

[475] R-II § 197; Legrand Statement, § 36 **[CWS-3]**; Presentation, Hungarian Branch Strategic Meeting, Le Chèque Déjeuner (27 March 2012) **[R-0056] / [NAV-0066]**; Extract from Claimants' internal presentation (27 March 2012) **[C-0124]**.

[476] R-II § 198.

[477] *Id*., at §§ 199 – 200; Email from Mr. Yvon Legrand (Le Chèque Déjeuner) to Ms. Anne Boddaert (Le Chèque Déjeuner) (27 October 2012) **[R-0058]**.

[478] R-II § 201; *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004) **[RLA-0180]**.

[479] R-II § 204; *S.D. Myers v. Canada* Partial Award, § 284 **[CLA-0027]**; *AIG v. Kazakhstan*, § 292 **[CLA-0037]** / **[RLA-0006]**; *Ulysseas, Inc. v. Republic of Ecuador*, UNCITRAL, Final Award (12 June 2012) § 189 **[RLA-0179]**.

[480] R-II § 205; PIT Law, in force as of 1 January 2013 **[RLA-0189]**.

[481] R-II § 205.

[482] R-II § 206; Sample CD Hungary (termination letter of network agreement) (4 February 2013) **[C-0128]**; Board Meeting Minutes of Société Le Chèque Déjeuner C.C.R. (29 January 2013) **[R-0059]**; Collection of Network Agreement Termination Letters (4 February 2013) **[R-0060]**; Legrand Statement, § 40 **[CWS-3]**.

will allow Claimants to compete on a level playing field with the Erzsébet voucher and the SZÉP Card, even becoming an issuer if they have the desire and qualify. Thus, any deprivation experienced by Claimants is insufficiently permanent to constitute a violation of the BIT.[483]

327. A recognition that the State has an obligation to compensate for the effects of a valid exercise of regulatory powers would have a chilling effect on the State's right to regulate.[484] This is not a case of lawful compensable expropriation, but rather a case involving the non-compensable exercise of Hungary's police powers.[485] Claimants' proof of the supposed effects is deficient in any event, as it assumes that conditions that existed in 2011 would continue indefinitely.[486] Claimants hindered their ability to compete by depleting CD Hungary's reserves.

328. Claimants' true complaint concerns the alleged "*dissemination*" of its alleged customer base for fringe benefits associated with food.[487] Claimants, however, had no rights to a customer base and, indeed, customers routinely moved between issuers.[488] There is also no basis to conclude that Respondent appropriated a benefit for itself.[489] The SZÉP Card Issuers and the MNUA had to establish their own affiliate networks (and SZÉP Cards their own POS system), negotiate and sign contracts with clients, and launch their own marketing campaigns – all on restricted commissions.[490]

329. At the Hearing, Respondent also noted that this case is completely different from *Vivendi* and *Tecmed*. *Vivendi* does not concern general measures, as are at issue here. That case involved sovereign acts that were designed to illegitimately end the concession, to force its cancellation or renegotiation. That is not the case here. *Tecmed* involved a specific commitment. There was no such commitment here.[491]

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483 R-II §§ 203, 207.

484 RPHB-I § 3; *Vincent J. Ryan, Schooner Capital LLC, and Atlantic Investment Partners LLC v. Republic of Poland*, ICSID Case No. ARB(AF)/11/3, Award (24 November 2015), § 492 **[RLA-0267]**.

485 RPHB-I § 4; *compare Vivendi v. Argentina*, 7.5.22 (*involving* specific, rather than general measures) **[CLA-0021]** / **[RLA-0021]**.

486 RPHB-I § 8; *Burlington v. Ecuador* Decision on Liability, § 399 **[CLA-0008]** / **[RLA-0017]**.

487 RPHB-I § 6; Tr. Day 2 at 11:13-17 (Nagy), 16:23-17:10 (Gans and Nagy).

488 RPHB-I § 7.

489 *Id*.

490 *Id*.; Tr. Day 1 at 205:11 – 208:18 (Gans and Nagy), Tr. Day 2 at 60:61 (Gans and Nagy) (*discussing* dematerialization costs).

491 Tr. Day 4 at 66 – 67 (R. Closing).

(c) Tribunal Considerations and Conclusions

330. At the outset, the Tribunal recalls that Art. 5(2) of the BIT expressly clarifies that it considers as an "*expropriation*" "[…] *measures which could cause the investors of the other Party to be dispossessed, directly or indirectly, of the investments belonging to them in its territory*[.]*"*[492]

331. Thus, any "*measures*" have to be considered, irrespective of whether they are legislative, administrative, or other measures undertaken by the State.[493] What is relevant is whether such measures had the effect of dispossessing Claimants, directly or indirectly, of their investment. Therefore, the test is not which measure caused which effect, but whether the "*measures*" taken together as a package resulted in the dispossession. For the present case, this means that the Tribunal need not examine whether Respondent's taxation changes, administrative decisions taken, or the introduction of the Erzsébet voucher and the SZÉP Card, each by themselves, caused a dispossession. Rather, the Tribunal must examine whether these measures together had the effect of dispossession.

332. In this context, the Tribunal has noted the Parties' discussion of a possible difference between "*expropriation*" and "*dispossession*." The Tribunal does not consider that discussion relevant for its own decision. From the text of Art. 5(2), it is clear that the terms "*expropriation*", *nationalization*", and "*other measures*" describe the action taken by a government and indicate, by inserting the word "*other*", that the term "*measures*" includes all three of these terms. Thereafter, the term "*dispossessed*" describes the result of such measures.

333. Therefore, to determine if there is a dispossession, the Tribunal has to compare the economic value of Claimants' investment, *i.e.* its shareholding, before the disputed measures, to the value after such measures. This analysis will show whether there was a substantial loss in value and whether this loss was an effect of the measures.

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[492] In the official French version of the France-Hungary BIT, Art. 5(2) states as follows: "*Les Parties contractantes ne prennent pas de mesures d'exportation ou de nationalisation ou toutes autres mesures <u>dont l'effet</u> est de déposséder, directement ou indirectement, les investisseurs de l'autre Partie des investissements leur appartenant sur son territoire et dans ses zones maritimes, si ce n'est pour cause d'utilité publique et à condition que ces mesures ne soient pas discriminatoires, ni contraires à un engagement particulier.* […]" **[CLA-0001] / [RLA-0079]** (emphasis added).

[493] As mentioned in the *Edenred* Award (§ 316), this conclusion is supported (applying Art. 31(1) VCLT) by the literal wording of the BIT, which uses the adjective "*any*" to emphasize the broadness of scope. Consequently, the term "*measures*" encompass all administrative acts taken by the Hungarian State, including its agencies and territorial bodies, legislative acts of general application, formalized as laws approved by Parliament or as decrees or other regulations authorized by the Government, and judicial decisions adopted by Hungarian courts and other judicial bodies.

334. Before Respondent's 2011 Reform, Claimants' investment had produced a profit every year since 2004, including the years after Reforms 2009 and 2010 to which Claimants had to readapt their access to the market.[494] While the extent of profit and the effective value of the shareholding will have to examined in the later chapter on damages, in the present context it suffices to state that, for years, the shareholding was an investment with a considerable economic value.

335. The Tribunal now has to examine whether Claimants were substantially dispossessed of that economic value by Respondent's 2011 Reform.

336. Respondent concedes that "[i]*n order to constitute an indirect expropriation, measures taken by the State must interfere with property rights to such an extent that these rights are 'rendered so useless that they must be deemed to have been expropriated' so that the measures thus must effectively destroy the economic benefit of the investment, resulting in the 'neutralization, radical deprivation, irretrievable loss, inability to use, enjoy or dispose of the property' and/or 'that the property can no longer be put to reasonable use' or 'makes any form of exploitation of the property disappear.'*"[495]

337. While the Tribunal does not necessarily subscribe to every detail of this interpretation, it considers that, in the present case, the essence of this interpretation by Respondent itself is fulfilled.

338. The evidence as confirmed at the Hearing shows that Respondent, as part of the 2011 Reform, adopted a number of measures which it itself considered as a package under that name: (1) the SZÉP Card, (2) the Erzsébet voucher, and (3) a preferential tax rate.[496] Taking into account the earlier considerations to the effect that the results of the package rather than those of each particular measure are relevant for an examination under Art. 5(2) of the BIT, the Tribunal now has to examine the results of the package of the 2011 Reform.

339. The first measure was the introduction of the SZÉP Card by decree of 12 April 2011.[497] Although Respondent has argued that it was only designed to purchase holiday-related services, Respondent's witness Mr. Szatmáry confirmed at the Hearing that, from the outset, the

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[494] *See* C-I §§ 34 – 45, 139 (chart), 141.

[495] R-II § 183; *National Grid v. Argentina* **[CLA-0053]**; *Electrabel v. Hungary*, Decision on Jurisdiction **[CLA-0070]**; *Biwater v. Tanzania* **[CLA-0017]** / **[RLA-0016]**; *Starrett v. Iran* **[RLA-0065]**.

[496] This was acknowledged by Respondent's witness Szatmáry at Tr. Day 2 at 155:8-13 (Szatmáry).

[497] Decree No. 55/2011 **[C-0073]** / **[RLA-0091]**.

government intended to use the SZÉP Card to purchase hot meals.[498] And indeed, the provisions of the PIT Law applicable to the SZÉP Card were quickly amended after the entry into force of the decree of 12 April 2011 to allow the SZÉP Card to purchase hot meals.[499]

340. In order to qualify as a SZÉP Card Issuer, a company had (and still has)[500] to meet mandatory and cumulative conditions set forth in the decree of 12 April 2011, including:[501]

- be a "service provider", *i.e.* a financial institution or be linked to such institution by contract;
- have existed for at least 5 years before starting to issue SZÉP cards;
- have premises open to the public in every city in Hungary with more than 35,000 inhabitants (there are at least 25 such cities in Hungary);
- have issued at least 100,000 bank cards at the end of the last financial year; and
- have at least 2 years of experience in the issuance of electronic vouchers for the provision of fringe benefits, with at least 25,000 vouchers issued at the end of the last financial year.

341. Since all of these cumulative criteria had to be satisfied, there was no way that CD Hungary could qualify. These criteria were obviously tailored such that only a small number of pre-selected issuers would qualify.[502] Mr. Szatmáry confirmed at the Hearing that the government knew, prior to the adoption of the SZÉP Card decree, which companies would qualify.[503]

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498 Tr. Day 2 at 154:10-12 (Szatmáry) ("*Q. Isn't it the case that by 1 January 2012 the SZÉP Card had been extended to hot meals? Is that correct? A. From the beginning it was included*.").

499 C-I § 144; 2011 PIT Law **[C-0074]** / **[RLA-0088]**.

500 While Respondent has indicated that these criteria would be modified as of 1 January 2017, these modifications have not been provided to the Tribunal. R-II §§ 94, 326. Regardless, however, as the Tribunal finds below, the modifications were not foreseeable as of the Valuation Date. .

501 Decree No. 55/2011, 3 **[C-0073]** / **[RLA-0091]**.

502 C-I §§ 144 – 155; C-II §§ 82 – 86; The letters exchanged in February 2011 between the Ministry for National Economy and the PSZAF show that, having restricted the possibility to become a SZÉP Card Issuer to financial institutions, Respondent tailored the criteria to ensure that no more than two or three banks would be eligible. *See* Letter from Mr. Endre Horváth (Deputy Minister of State, responsible for economic development) to Mr. László Balogh (Vice-President, the PSZAF), 15 February 2011 **[C-0148]**; Letter from Mr. László Balogh (Vice-President, the PSZAF) to Mr. Endre Horváth (Deputy Minister of State, responsible for economic development), 28 February 2011 **[C-0149]**.

503 *See* Tr. Day 2 at 120:20 – 121:6 ("Szatmáry") ("*Q. Can we agree that in the category which is called on the document 'Entities that meet all relevant terms and conditions', there are three companies identified: 1,OTP; 2, K&H; 3, MKB. Can we agree on those three which are listed in the entities that meet all relevant terms and conditions?*

A. Yes

342. Therefore, the Tribunal concludes from the evidence that Respondent defined criteria for SZÉP Card Issuers that only selected banks could meet. While the SZÉP Card Decree theoretically makes it possible for any company to become an issuer, Respondent knew – and intended – that in practice no company other than three selected banks, and certainly not the Claimants, would qualify.

343. The second measure was the Erzsébet voucher. It was a paper voucher which could only be issued by a State-owned entity, the MNUA, and was introduced by the 2011 PIT Law.[504] The Erzsébet voucher was initially presented to be used for the purchase of cold meals only. As confirmed by Respondent, it decided to extend it to hot meals first for 2012 only, and then permanently from 2013 onward.[505.]

344. For Claimants, this measure eliminated the remaining segment of the market in which CD Hungary could have continued to sell its vouchers. This segment was relevant, because of the low acceptance of electronic cards in many areas of Hungary. If the Erzsébet voucher had been confined to cold meals, clients who wanted to buy hot meal vouchers for their employees without using the SZÉP Card could have turned to the hot meal paper vouchers issued by CD Hungary. With the extension of the Erzsébet voucher to hot meals, however, this possibility disappeared.

345. The third measure was a change in the taxation rules applicable to meal vouchers, adopted by the 2011 PIT Law.[506] The SZÉP Card and the Erzsébet voucher were given a preferential tax rate over the existing meal vouchers sold by CD Hungary and other issuers. The 2011 Reform reserved a preferential tax rate of 30.94% (Art. 71 of 2011 PIT Law) for the SZÉP Card and the Erzsébet voucher, while transferring the hot and cold meal vouchers sold by CD Hungary (and other French issuers) to another category of "*specific defined benefits*" (Art. 70 of the 2011 PIT

Q. This list is a proposal dated March 2011 before the decree was adopted, so you knew at the time that those three would meet the requirement of the SZÉP Card decree that would be adopted a month later?

A. Well, yes. […]") (*discussing* SZÉP Card Proposal, 30 **[R-0008]**); *see also* Letter from Mr. Horváth to Mr. Balogh **[C-0148]** ("*It is an important part of the concept that* (...) *the requirements could only be met by large market actors and, as a result, create an oligopolistic market with 2-3 actors.* (...) *The MNE requests the HSFA to review these terms and conditions* (...) *to ease them to ensure that potentially the 2-3 largest actors should be able to comply with them*."); Letter from Mr. László Balogh (Vice-President, the PSZAF) to Mr. Endre Horváth (Deputy Minister of State, responsible for economic development) (28 February 2011) **[C-0149]**.

504 2011 PIT Law **[C-0074] / [RLA-0088]**, National Ministry of Economics, Proposal for the Government in Connection with the Amendment of Certain Tax Acts and Other Related Acts (11 October 2011), 9 **[R-0016]**.

505 C-I § 158; Law CVX of 2013 on The amendment of certain acts on economic matters (21 June 2013) **[C-0086]**.

506 2011 PIT Law **[C-0074] / [RLA-0088]**.

Law) which were subject to a tax rate of 51.17%, *i.e.* significantly higher than the rate applicable to the two new products.

346. The Tribunal is not persuaded by Respondent's argument that non-meal vouchers were taxed at the same rate as the SZÉP Card and Erzsébet voucher after the 2011 Reform. Only meal vouchers are relevant to this arbitration. It is also not relevant that the SZÉP Card and Erzsébet voucher were taxed at the same rate as CD Hungary's vouchers above the exemption ceiling, because the meal voucher market only exists, in practice, up to the exemption ceiling.[507] Finally, the Tribunal does not consider it relevant that CD Hungary's vouchers were still, after the 2011 Reform, subject to a tax rate that was lower than the rate applicable to salaries (96%), because, in practice, there was no market for these vouchers above the exemption ceiling, and employers could not be expected to increasingly use vouchers instead of salaries to pay their employees.

347. In view of these considerations, the Tribunal concludes that Respondent created a tax differential in favor of its two new products, the SZÉP Card and Erzsébet voucher, which disadvantaged CD Hungary. Whether this preferential tax treatment alone would have caused a dispossession of Claimants' investment does not have to be determined by the Tribunal because, for the reasons elaborated above, it is the result of Respondent's *package of measures*, *i.e.,* the SZÉP Card, the Erzsébet voucher, and the tax advantages, which together result in a dispossession.

348. In 2011, CD Hungary, Edenred, and Sodexo together accounted for 86% of the Hungarian meal voucher market.[508] The evidence shows that the 2011 Reform was intended to – and in fact did – exclude CD Hungary (and other French issuers) from the meal voucher market and replace them, such that the profits made in this sector would no longer be made by foreign-owned companies such as CD Hungary, and repatriated to their foreign owners like Claimants, but would instead stay in Hungary.

349. That this was, indeed, a goal of the package was confirmed by a speech by the State Secretary of the KIM to the Hungarian Parliament in which he mentioned:

[507] As explained by Ms. Nagy, clients would normally have a budget to buy meal vouchers for their employees which corresponds to the cumulated value of the exemption ceiling for hot and cold meal vouchers. Once the total exemption ceiling has been reached, clients would have no more budget. It is therefore irrelevant that CD Hungary could theoretically compete with the Erzsébet voucher and the SZÉP card on equal terms above the exemption ceiling. Virtually no company would have purchased vouchers above the exemption ceiling. Tr. Day 2 at 21:14 – 22:3 (Nagy).

[508] First FTI Report, §§ 3.17, 3.19-3.20 **[CEX-1]**.

> [a]*s for the Erzsébet voucher in particular: this field has been controlled by foreign owned companies. The 10% financial profit of the voucher market, which exceeds HUF 200 billion, has been realized by foreign-owned companies. By this proposal, 100% of the profit will stay in Hungary and serve a public purpose, the social and child-based catering. For the Government, it is hard to find resources financing public well-being and community purposes, but this is a typical success story, since the profit, which had [sic] until now migrated abroad now forms a huge meal-voucher market as profit, it will serve the purposes of social and children catering henceforward.* […][509]

350. This is also confirmed by a Draft Proposal of September 2011 for the reform of the fringe benefit system, which was addressed to the Government.[510] It clearly states that the hot meal account of the SZÉP Card "*would be <u>the successor of the previous hot meal voucher</u> in the form of a card*[.]*"*[511] Like the May 2011 Memorandum, this September 2011 Draft Proposal repeated that the hot meal account of the SZÉP Card "*would thus be the electronic card version of the previous hot meal vouchers"* and expressly clarified that *"[t]his decision would mean that the hot meal benefits would be issued by the institutions entitled to issue the SZÉP Card <u>instead of the current issuers</u>."*[512] The reference to "*instead of the current issuers*" leaves no doubt that the hot meal vouchers would be issued by the SZÉP Card Issuers and would no longer be issued by the existing or then-current issuers – including CD Hungary.

351. In view of the above, the Tribunal concludes from the evidence that Respondent intended to create a State monopoly and evict CD Hungary from the meal voucher market, or at the very least, it knew that the effect of the 2011 Reform would be that no clients would continue to buy CD Hungary's meal vouchers and that they would buy the SZÉP Card and Erzsébet voucher instead.

352. As a result of the 2011 Reform, CD Hungary was evicted from the meal voucher market. Meal vouchers represented 97% of its business in 2011.[513]

353. As argued by Claimants, CD Hungary was in a desperate position within months after the implementation of the 2011 Reform, and there is no evidence that Respondent had any intention to change the 2011 Reform. The destruction of the value of Claimants' shareholding was permanent, or at least sufficiently permanent for the purposes of expropriation. Under these

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[509] Speech No. 152/90 by Dr. Bence Rétvári (State Secretary of the KIM) (Plenary Session of Parliament) (12 December 2011) **[C-0119]** / **[R-0055]**.

[510] Proposal for the Government on the reform of the system of fringe benefits, dated September 2011 **[R-0015]**.

[511] *Id*. (emphasis added).

[512] *Id*. (emphasis added).

[513] First FTI Report, § 4.23 **[CEX-1]**.

circumstances, the Tribunal accepts that Claimants' decision to shut down as of 2013 and to repatriate some of CD Hungary's reserves after CD Hungary started to collapse following the 2011 Reform was inevitable. This was a legitimate and reasonable decision justified to avoid further losses.

354. In conclusion, the Tribunal finds that the package of Respondent's measures in the 2011 Reform, resulting in creating in fact a State monopoly and excluding CD Hungary from the meal voucher market, dispossessed Claimants of the greatest part and the economic heart of their investment, bringing CD Hungary to a standstill. By destroying CD Hungary's economic value Respondent substantially dispossessed Claimants of their investment.

355. The Tribunal notes that this conclusion is in conformity with that in the *Edenred* Award, though certain factual and legal differences between the two cases exist.[514]

356. Having established that a dispossession as required under Art. 5(2) of the BIT was indeed effected by Respondent, the Tribunal will now turn to the question whether this dispossession was lawful and, therefore, that it does not justify the consequences provided by Art. 5(2) of the BIT or by a breach of that provision.

3. The Lawfulness of the Alleged Expropriation

357. This section also contains the Parties' responses to the Tribunal's Question (k):

> *k) Taking into account that fringe benefit legislation is generally for social reasons, what were the further social or other reasons of the reform by Respondent?*

(a) Claimants' Arguments

358. Article 5(2) should be read as codifying the customary international law definition of expropriation.[515] Accordingly, an expropriation is only lawful under the BIT if it is (1) for a public purpose, (2) non-discriminatory, (3) conducted, each by themselves in accordance with

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[514] Edenred, § 434 ("*In summary, the counter-arguments submitted by Respondent cannot be endorsed by the Arbitral Tribunal. The 2012 Reforms constitute 'measures having the effect of directly or indirectly dispossessing' Edenred of its investment in Hungary, in breach of Art. 5(2) of the BIT.*").

[515] C-I §§ 242 – 244; C-II § 164; International Investment Law: A Changing Landscape, a Companion Volume to International Investment Perspectives, Chapter 2 "Indirect Expropriation and The Right to Regulate" in International Investment Law, OECD, 2005, 49 **[CLA-0010]**; *Söhne v. CAR*, § 300 **[CLA-0011]**.

due process of law, (4) accompanied by prompt and adequate compensation, and (5) not contrary to a specific undertaking.[516]

359. International law does not recognize a blanket exception related to "*general regulatory powers*."[517] Here, Respondent cannot meet its burden of proving that the measures in question were justified on the grounds that they were a "*legitimate exercise of Hungary's general regulatory powers*."[518] Respondent knowingly targeted Claimants' investment and the 2011 Reform was disproportionate and discriminatory.[519] Furthermore, a State's right to adopt regulatory measures must be exercised in good faith. Measures deliberately targeting an investor cannot be a legitimate exercise of a State's police powers.[520]

360. Confiscatory taxation is, for example, by definition expropriatory.[521] The effects of the tax are critical.[522] The 2011 Reform was effectively confiscatory as it destroyed any prospect of "*economic or commercial use*" of Claimants' investment. Through the imposition of discriminatory taxation, Respondent ousted Claimants and their Non-Hungarian competitors from the market they built, leaving the resulting profits to be divided between the MNUA and select Hungarian financial groups.[523] The analysis of a tax measure is indistinguishable to that applied to any other regulatory measure – it must meet the five criteria outlined above.[524]

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[516] C-II §§ 168, 261, 265; *Vivendi v. Argentina*, § 7.5.21 **[CLA-0021]** / **[RLA-0021]**.

[517] C-I § 274; C-II §§ 221 – 224; *Pope & Talbot v. Canada* Interim Award, § 99 **[CLA-0014]**; *Tecmed v. Mexico*, § 119 **[CLA-0022]** / **[RLA-0068]**; *ADC v. Hungary*, § 423 **[CLA-0030]** / **[RLA-0004]**.

[518] C-II §§ 219 – 221, 233.

[519] *Id*., at §§ 221, 231 – 235; Andrew Newcombe and Lluis Paradell, Law and Practice of Investment Treaties: Standards of Treatment, 1st Edition, Kluwer Law International, 2009, § 7.27 **[CLA-0218]**; *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award (5 September 2008) [hereinafter "*Continental Casualty v. Argentina*"], § 276 **[RLA-0023]**.

[520] C-II § 252; *Vivendi v. Argentina*, § 7.5.22 **[CLA-0021]** / **[RLA-0021]**; *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award (15 April 2009) [hereinafter "*Phoenix Action v. Czech Republic*"], § 107 **[CLA-0219]**.

[521] C-I §§ 275 – 276; C-II § 225; *Burlington v. Ecuador* Decision on Liability, §§ 393 – 401 **[CLA-0008]** / **[RLA-0017]**; *Marvin Feldman v. Mexico*, § 101 **[CLA-0013]** / **[RLA-0041]**; *ADC v. Hungary*, § 423 **[CLA-0030]** / **[RLA-0004]**; *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN3467, Award (1 July 2004) ["*Occidental v. Ecuador* LCIA Award"], § 85 **[CLA-0031]**; *ADM v. Mexico*, § 238 **[CLA-0032]**; *Saluka v. Czech Republic*, § 264 **[CLA-0049]** / **[RLA-0059]**; *RosInvest v. Russia*, § 629 **[CLA-0099]**.

[522] C-II § 226; *Burlington v. Ecuador* Decision on Liability, § 395 **[CLA-0008]** / **[RLA-0017]**.

[523] C-I § 278; Legrand Statement, § 39 **[CWS-3]**.

[524] C-I § 277; *Tecmed v. Mexico*, § 121 **[CLA-0022]** / **[RLA-0068]**; *S.D. Myers v. Canada* Partial Award, § 282 **[CLA-0027]**; *ADM v. Mexico*, §§ 240 – 242 **[CLA-0032]**; *Corn Products International, Inc. v. United Mexican*

361. Although Claimants disagree that tax measures need to fulfill additional criteria to be considered expropriatory, they would be met in this case. Three factors are of particular relevance: the presence of discrimination, the effect of the tax measures, and Respondent's intent.[525] It is undisputed that no undertaking was violated and that no compensation was given.[526] Claimants submit that the lack of compensation renders this expropriation unlawful. Below, the disputed aspects of Respondent's expropriation are addressed, including the alleged (1) public purpose and (2) proportionality of the measures, (3) their discriminatory nature (including Respondent's intent), (4) Respondent's violation of due process, and (5) whether the lack of compensation makes this taking unlawful.

(i) Existence of a Public Purpose and Tribunal's Question (k) Regarding Social or other Reasons for Reform

362. The purpose of the 2011 Reform was to exclude the Non-Hungarian issuers from the Hungarian voucher market. Here, Respondent has admitted that the 2011 Reform was intended to keep the profit previously "*realized by foreign-owned companies*" within Hungary.[527] The public policy goal of keeping profits within the country, rather than the prospect of Claimants repatriating them, is not a legitimate public purpose under Art. 5(2) of the BIT.[528] There is no basis to assume that the State Secretary of the KIM and the Secretary of State at the Ministry of National Resources were lying to the Hungarian Parliament when they made their statements. Their statements are attributable to Respondent and are a clear indication of the true intention of the Government.[529]

States, ICSID Case No. ARB(AF)/04/1, Award (15 January 2008) [hereinafter "*Corn Products v. Mexico*"], § 92 **[CLA-0033]**.

[525] C-I §§ 279 – 283; *Burlington v. Ecuador* Decision on Liability, §§ 374 – 375, 393, 402 **[CLA-0008] / [RLA-0017]**; *Pope & Talbot v. Canada* Interim Award, § 96 **[CLA-0014]**; *EnCana v. Ecuador*, § 177 **[CLA-0019] / [RLA-0158]**; *Vivendi v. Argentina*, § 7.5.20 **[CLA-0021] / [RLA-0021]**; *CME v. Czech Republic* Partial Award, § 603 **[CLA-0023]**; *ADM v. Mexico*, § 250 **[CLA-0032]**; *Corn Products v. Mexico*, § 90 **[CLA-0033]**; Andrew Newcombe and Lluis Paradell, Law and Practice of Investment Treaties: Standards of Treatment, 1st Edition, Kluwer Law International, 2009, 361-362 **[CLA-0034]**; *Link-Trading Joint Stock Company v. Department for Customs Control of the Republic of Moldova*, UNCITRAL, Award (18 April 2002) [hereinafter "*Link-Trading v. Moldova*"], § 64 **[CLA-0035]**.

[526] C-I § 310; C-II § 265; *Vivendi v. Argentina*, § 7.5.21 **[CLA-0021] / [RLA-0021]**.

[527] C-II § 253; Respondent press release, "The Government Launches Social Holidays Programme" (12 January 2012) **[C-0083]**; Dr. Bence Rétvári (State Secretary of the KIM), Speech at the Parliament No 152/90 (12 December 2011) **[C-0119]**; Mr. Miklós Soltész (Ministry of Natural Resources), Speech at the Parliament No 152/161 (12 December 2011) **[C-0120]**; Mr. Miklós Soltész (Ministry of Natural Resources), Speech at the Parliament No 152/165 (12 December 2011) **[C-0121]**.

[528] C-I §§ 292 – 294; *ADC v. Hungary*, § 423 **[CLA-0030] / [RLA-0004]**.

[529] C-II §§ 257 – 258; *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 227, Award (18 July 2014) [hereinafter "*Yukos v. Russia*"], § 1472 **[CLA-0071]**; "Responsibility of

While Respondent seeks to downplay the significance of these remarks, Respondent's deliberate targeting of Claimants' investment supports a finding of expropriation.[530]

363. If the true purpose was to protect consumers through regulation and technological innovation, as Respondent now alleges, it would not have ignored the proportionate, more efficacious alternatives that were available.[531]

364. The social reasons inherent to fringe benefit legislation cannot explain the 2011 Reform, as those social reasons are already inherent to fringe benefit legislation and are thus irrelevant to explain the 2011 Reform.[532]

365. First, in response to Respondent's allegation that the Erzsébet voucher was intended to (1) improve the health and nutrition of disadvantaged Hungarians, and (2) to provide food security to those living in the country side,[533] Claimants explain that both goals were met by the meal voucher system prior to the 2011 Reform.[534] In any event, Respondent admitted that the ceiling of the Erzsébet voucher was so low that it does not actually provide much food security.[535]

366. Second, Respondent's claim that the Erzsébet voucher was created to fund a social welfare program cannot serve as an excuse to create a monopoly. There were less onerous measures that could have achieved the same purpose – including the imposition of a social tax – without excluding CD Hungary and other French issuers.[536]

367. Third, in response to Respondent's alleged public purpose that the reform would solve structural problems identified in a review of the voucher system, Respondent has failed to show that such a review ever existed. None of the documents upon which Respondent relied prove that the information was gathered, analyzed, or collated on the structural problems or that a review was

States for Internationally Wrongful Acts", 53 UN GAOR Supp. (No. 10) at 43, UN Doc. A/56/83 (2001) Art. 4 **[CLA-0080]**.

530 C-II §§ 254 – 256; R-I § 185; *Burlington v. Ecuador* Decision on Liability, § 401 **[CLA-0008]** / **[RLA-0017]**.

531 C-II §§ 261 – 262; R-I § 178, 181.

532 CPHB-I Annex No. 7.

533 *Id*.; R. Opening Slide 28.

534 CPHB-I § 62, Annex No. 7; R-I § 82; Tr. Day 1 at 126:22-23 (R. Opening).

535 CPHB-I Annex No. 7; Tr. Day 1 at 126:22 – 23 (R. Opening).

536 CPHB-I Annex No. 7.

conducted.[537] Likewise, none of Respondent's witnesses have demonstrated that there were problems in the voucher system or that a review was conducted.[538]

368. Fourth, even if Respondent's alleged problems of "*the diversion of income from intended beneficiaries*" or the "*subsidization of private companies*" existed, they were marginal and could not have caused a diversion of the amounts of income, as alleged. Voucher issuers did not receive a subsidy from the State. Rather, the issuers issued vouchers that benefitted from a preferential tax treatment through reduced rates of healthcare contributions and personal income tax rates. The issuer's clients (employers) benefitted from the preferential tax and thus, the employees, not the issuer, benefitted.[539]

369. Fifth, Respondent's public purpose arguments that the SZÉP Card was meant to allow the creation of a more modern, secure, efficient, solvent and cost-effective system based on electronic vouchers does not explain (1) the stringent criteria to become a SZÉP Card Issuer or (2) the preferential tax rate, as neither are necessary to achieve this objective.[540] To the contrary, Respondent's creation of the Erzsébet voucher as a paper voucher contradicts the stated intention to dematerialize the voucher market.[541]

(ii) Proportionality and the Effect of the Measure

370. To be a legitimate exercise of police power, regulatory measures must be proportionate to the public purpose pursued. That measures are adopted in the public interest does not preclude them from being expropriatory or absolve the state from its duty to compensate.[542] As with any other measure, the critical question is the extent of the interference with the investor's property.[543] The

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537 *Id*.

538 *Id*., CPHB-I §§ 55 – 60; Tr. Day 2 at 102:17-18, 103:3-15 (Szatmáry) (*describing* extent of research); First Guller Statement, § 16 **[RWS-1]**; J. Bindics and N. Szabó, Fringe Benefits in the EU Member States, Ernst & Young Presentation (13 March 2012) **[R-0022]**; Chart listing *Practical Function of In Kind Benefits in the EU Member States* **[R-0038]**; Chart listing *Taxation of In Kind Benefits in the EU Member States* **[R-0039]**.

539 CPHB-I Annex No. 7

540 *Id*.; CPHB-I § 63.

541 CPHB-I § 64; First Guller Statement, § 32 **[RWS-1]**.

542 C-II §§ 227, 229; R-I §§ 178, 182; *Tecmed v. Mexico*, § 121 **[CLA-0022]** / **[RLA-0068]**; *Desarrollo v. Costa Rica*, § 72 **[CLA-0215]**.

543 C-II § 228; *Pope & Talbot v. Canada* Interim Award, § 102 **[CLA-0014]**; *Tecmed v. Mexico*, § 115 **[CLA-0022]** / **[RLA-0068]**; *ADM v. Mexico*, §§ 240, 246 **[CLA-0032]**; *LG&E v. Argentina* Decision on Liability, §§ 189 – 191 **[CLA-0041]** / **[RLA-0038]**.

deference due to a host state does not preclude tribunals from scrutinizing the proportionality of the measures adopted.[544]

371. During the EU proceedings, the EC explained that the conditions for the issue of the SZÉP Card were neither necessary nor proportionate – they bore no relationship to the aim allegedly sought to be realized. First, Respondent failed to demonstrate that the problems it alleges ever arose. Second, no other EU Member State had imposed comparable requirements on the issuers of electronic vouchers. Third, less restrictive measures were available to Respondent. Fourth, Respondent rebuffed Claimants' and AETR's efforts to engage with Respondent, and this in and of itself was disproportionate. Fifth, even credit institutions are not subject to statutory conditions comparable to those contained in Art. 13 of the SZÉP Decree. A voucher cannot be equated with a bank card. The CJEU agreed and found that the conditions for the issuance of the SZÉP Card were neither necessary nor proportionate.[545]

372. Since the CJEU found the introduction of the Erzsébet voucher was disproportionate, it did not rule on the EC submission that the Erzsébet voucher generated further heavy losses by having an inappropriate transitional period, causing Claimants to bear an individual and excessive burden. This precludes the 2011 Reform from being a legitimate exercise of Respondent's general regulatory powers.[546]

373. Less restrictive methods were available to Respondent with respect to the introduction of the Erzsébet voucher, as well. Respondent was aware that less onerous options, such as the

[544] C-II § 230; *Tecmed v. Mexico*, § 122 **[CLA-0022]** / **[RLA-0068]**; *Azurix v. Argentina*, § 311 **[CLA-0092]** / **[RLA-0012]**; *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award (31 October 2012) [hereinafter "*Deutsche Bank v. Sri Lanka*"], § 522 **[RLA-0025]**; *LG&E v. Argentina* Decision on Liability, § 195 **[CLA-0041]** / **[RLA-0038]**; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award (5 October 2012) [hereinafter "*Occidental v. Ecuador* ICSID Award"], §§ 404, 416, 427 **[RLA-0049]**.

[545] C-II §§ 239 – 240; *EC v. Hungary*, CJEU Judgment **[C-0153]**; *Tecmed v. Mexico*, § 122 **[CLA-0022]** / **[RLA-0068]**.

[546] C-II §§ 241 – 244; *EC v. Hungary*, CJEU Judgment **[C-0153]**; Email from Mr. Pierre Gagnoud (Edenred) to Mr. Bálint Bessenyey (Sodexo) and Ms. Márta Nagy (16 April 2012) **[C-0154]**; National Ministry of Economics, Proposal for the Government in Connection with the Amendment of Certain Tax Acts and Other Related Acts (11 October 2011) **[R-0016]**; *Tecmed v. Mexico*, § 122 **[CLA-0022]** / **[RLA-0068]**; *LG&E v. Argentina* Decision on Liability, § 196 **[CLA-0041]** / **[RLA-0038]**; *Azurix v. Argentina*, § 311 **[CLA-0092]** / **[RLA-0012]**; *Case of James and others v. The United Kingdom*, European Court of Human Rights, Court (Plenary), Application No. 8793/79, Judgment (21 February 1986) [hereinafter "*James v. United Kingdom*"], §§ 50 **[CLA-0199]**; *Deutsche Bank v. Sri Lanka*, § 522 **[RLA-0025]**; *LG&E v. Argentina* Decision on Liability, § 195 **[CLA-0041]** / **[RLA-0038]**.

imposition of a "*solidarity levy*" were available and were indeed raised during discussions between Respondent and the AETR in Spring 2012.[547]

(iii) Discrimination

374. The 2011 Reform was also discriminatory and, accordingly, cannot be a legitimate exercise of the State's police power.[548] Although Art. 13 of the SZÉP Decree does not openly discriminate on the grounds of nationality, in practice, the only entities able to satisfy the requirements to become SZÉP Card Issuers were three banks seated in Hungary.[549] Although the 2011 Reform privileged three Hungary-based banking groups, Claimants do not submit that they suffered discrimination on that basis. Rather, (1) CD Hungary was in like circumstances to the Beneficiaries of the 2011 Reform, and (2) the 2011 Reform subjected it and Claimants as investors to differential treatment without reasonable justification.[550] Respondent has not discharged its burden of proof that no discrimination has taken place. The differential treatment included (1) establishing criteria for the issue of SZÉP Cards (which could be used as an "account" to purchase hot meals) that only three Hungary-based groups could meet, (2) granting MNUA a monopoly over the issue of Erzsébet vouchers (initially limited to cold meals, but extended to hot meals), and (3) introducing a tax framework that subjected CD Hungary's meal vouchers to higher tax rates than those imposed on the SZÉP Card and Erzsébet voucher, in order to penalize CD Hungary by encouraging clients and users to switch products.[551]

375. Prior to the reform, OTP Bank had only been able to acquire 2% of the meal voucher market. After the 2011 Reform, the Beneficiaries used their new found fiscal advantage to drive the non-

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[547] C-II § 242; *EC v. Hungary*, CJEU Judgment, § 125 **[C-0153]**.

[548] C-II §§ 236, 245, 263; R-I §§ 178, 196; *Tecmed v. Mexico*, § 122 **[CLA-0022] / [RLA-0068]**; *CMS Gas v. Argentina* Award, § 293 **[CLA-0036]**; *LG&E v. Argentina* Decision on Liability, § 196 **[CLA-0041] / [RLA-0038]**; *Azurix v. Argentina*, § 311 **[CLA-0092] / [RLA-0012]**; *James v. United Kingdom*, §§ 50, 63 **[CLA-0199]**; *Deutsche Bank v. Sri Lanka*, § 522 **[RLA-0025]**.

[549] C-II § 238; Decree No. 55/2011 **[C-0073]**.

[550] C-II §§ 246 – 247, 249; PIT Law as amended in 2010, effective 1 January 2011 **[C-0068]**; 2011 PIT Law, Art. 70, 71(1)(bb) **[C-0074] / [RLA-0088]**; *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia*, Arbitration Institute of the Stockholm Chamber of Commerce, under the Energy Charter Treaty, Award (16 December 2003) [hereinafter "*Nykomb v. Latvia*"], 34 **[CLA-0065] / [RLA-0048]**.

[551] C-II § 248; *see also* C-I §§ 284 – 285, 296 – 299; *ADC v. Hungary*, § 442 **[CLA-0030] / [RLA-0004]**; *CMS Gas v. Argentina* Award, § 293 **[CLA-0036]**; Legrand Statement, § 25 **[CWS-3]**.

Hungarian Issuers from the market. By 2012, the Non-Hungarian issuers who had made up 86% of the market were almost completely displaced.[552]

376. There was no reasonable justification for the imposition of differential tax treatment – CD Hungary's meal vouchers were functionally identical to the Erzsébet voucher and the meals account on the SZÉP Card.[553] There was no reason to reclassify CD Hungary's meal vouchers as "*specific defined benefits*" with a higher tax rate, rather than "*non-wage benefits*", as the Erzsébet and SZÉP Card were classified and as CD Hungary's vouchers were previously classified.[554] The 2011 Reform deliberately targeted Claimants' investment, breaching Respondent's international obligations and Claimants' legitimate expectations. Such a bad faith measure cannot be a legitimate exercise of the State's police powers.[555]

(iv) Due Process

377. Although the requirement of due process is not expressly contained in Art. 5(2), due process is an element in the expropriation analysis under customary international law. It requires, in the words of *ADC v. Hungary*, that there be an "*actual and substantive legal procedure for a foreign investor to raise its claims against the depriving actions […]*"[556] The expropriation was carried out without due process. The FIDESZ government so weakened the independence and reach of the judiciary that the basic requirement of due process would not have been met in relation to any measures passed at the time of the 2011 Reform.[557] To the extent that Respondent alleges that it fulfilled its due process obligations by engaging in "*extensive consultation*" with market

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552 C-I § 286; Edenred, Sodexo, Chèque Déjeuner press release "Reform of the restaurant voucher in Hungary" (2012) **[C-0071]**; First FTI Report, § 1.11 **[CEX-1]**.

553 C-I §§ 288 – 289; C-II § 249; PIT Law as amended in 2010, effective 1 January 2011 **[C-0068]**; 2011 PIT Law, Art. 70, 71(1)(bb) **[C-0074] / [RLA-0088]**.

554 C-I § 287.

555 *Id*., at § 290; C-II §§ 251 – 252, 259 – 260; R-I §§ 178, 203; *Vivendi v. Argentina*, § 7.5.22 **[CLA-0021]** / **[RLA-0021]**; *ADC v. Hungary*, § 424 **[CLA-0030]** / **[RLA-0004]**; *Phoenix Action v. Czech Republic*, § 107 **[CLA-0219]**.

556 C-I §§ 300 – 302; *AIG v. Kazakhstan*, § 10.3.1 **[CLA-0037]** / **[RLA-0006]**; *Generation Ukraine v. Ukraine*, § 11.3 **[CLA-0038]** / **[RLA-0032]**; Andrew Newcombe and Lluis Paradell, Law and Practice of Investment Treaties: Standards of Treatment, 1st Edition, Kluwer Law International, 2009, 338-339 **[CLA-0039]**; *Siag v. Egypt*, §§ 427 – 428 **[CLA-0040]**.

557 C-I §§ 303 – 304; C-II § 264.

participants, to the extent that any consultation was conducted, key stake holders and the existing issuers were excluded.[558]

(v) Duty to Compensate

378. Even if the 2011 Reform had been adopted in the public interest, that would not preclude it from being expropriatory, nor would it absolve the State of its obligation to compensate. A lawful expropriation under Art. 5(2) of the BIT must be accompanied by prompt and adequate compensation – the failure to pay compensation will make an otherwise lawful expropriation unlawful.[559] Although it can be argued that the failure to pay compensation should not render an otherwise lawful expropriation unlawful, Respondent has never even offered Claimants compensation. Accordingly, Respondent committed an unlawful expropriation contrary to Art. 5(2) of the BIT.[560]

(b) Respondent's Arguments

379. Claimants' expropriation claim fails because the legislative measures were enacted for a public purpose and were applied equally to all investors. As Claimants agree, economic damage caused by *bona fide*, general, proportionate, and non-discriminatory regulation is not, in normal circumstances, compensable.[561] The application of the police powers doctrine, in particular with respect to tax and fiscal policy, precludes a finding of expropriation. Nothing in international law or the BIT prohibits a country from creating tax breaks or subsidies, so long as those decisions are not discriminatory.[562] The deprivations of which Claimants complain are not expropriatory

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[558] C-II § 264.

[559] *Id*., at § 265; C-I §§ 305 – 311; *Burlington v. Ecuador* Decision on Liability, § 542 **[CLA-0008]** / **[RLA-0017]**; *Vivendi v. Argentina*, § 7.5.21 **[CLA-0021]** / **[RLA-0021]**; *Siemens v. Argentina*, § 273 **[CLA-0028]** / **[RLA-0063]**; *ADC v. Hungary*, § 444 **[CLA-0030]** / **[RLA-0004]**; *Siag v. Egypt*, §§ 434 – 435 **[CLA-0040]**; *Funnekotter v. Zimbabwe*, § 98 **[CLA-0043]**; *Conoco v. Venezuela*, § 362 **[CLA-0044]** / **[RLA-0022]**; *Mobil v. Venezuela*, §§ 301 – 306 **[RLA-0046]**.

[560] C-I § 310 – 311.

[561] R-I § 178; R-II §§ 97 – 99; C-II §§ 221 – 224, 231, 265; C-I § 178; *Marvin Feldman v. Mexico*, § 103 [**CLA-0013]** / **[RLA-0041]**; *Methanex v. USA*, § 7 **[RLA-0045]**; *Saluka v. Czech Republic*, § 255 **[CLA-0049]** / **[RLA-0059]**; France-Hungary BIT, Art. 5(2) **[CLA-0001]** / **[RLA-0079]**; M. Sornarajah, The International Law on Foreign Investment (3d ed. 2004) [**RLA-0107]**.

[562] R-II §§ 99 – 105; C-II §§ 223, 265; *Link-Trading v. Moldova*, § 64 **[CLA-0035]**; *RosInvest v. Russia*, §§ 628, 630 **[CLA-0099]**; *Tippetts, Abbett, McCarthy, Stratton v. Tams-Affa* (IUSCT), Case No. 7, Award, 6 IUSCTR 219 (22 June 1984) **[CLA-0211]**; Draft Convention on the protection of foreign property, Text with Notes and Comments, OECD (16 October 1967) **[CLA-0212]**; *Burlington v. Ecuador* Decision on Liability, §§ 391, 393, 394 **[CLA-0008]** / **[RLA-0017]**; *El Paso v. Argentina*, §§ 249 – 255, 290, 295 **[CLA-0025]** / **[RLA-0026]**; *Marvin Feldman v. Mexico*, § 113 [**CLA-0013]** / **[RLA-0041]**; *Suez v. Argentina* Decision on Liability, § 139

at all – rather, they are a legitimate exercise of the government's regulatory authority.[563] Below, Respondent demonstrates that the measures were (1) enacted for a public purpose, (2) were proportional to these goals, and (3) were non-discriminatory. Further, Respondent complied with (4) the requirements of due process. Accordingly, (5) Claimants are not owed compensation.

380. As an introductory note, Claimants' claim that CD Hungary's profits and market share were negatively impacted when Respondent changed its tax laws – which it did on a yearly basis – to decrease the tax benefit enjoyed by employees with regard to certain vouchers. Respondent does not tax vouchers – it offers tax breaks on some income that is provided as vouchers rather than salary. Claimants were not deprived of their investment or of any right by application of an excessive tax, making their "*confiscatory tax*" theory inapt.[564]

381. While Claimants wanted Respondent to accede to their demands and maintain the *status quo*, Claimants' sense of entitlement does not sustain a claim under the BIT.[565] The 2011 Reform did not contradict any commitment made by Respondent to Claimants, making this situation similar to that in *Methanex*, where – in the absence of a promise upon which to base their allegations of expropriation – the case was dismissed.[566] Claimants were not entitled to expect that the Hungarian regulatory regime would remain unchanged – the market was always predicated on a discretionary regulatory system.[567]

[RLA-0066]; *EnCana v. Ecuador*, § 177 **[CLA-0019]** / **[RLA-0158]**; *Quasar de Valors SICAV S.A. & Others* (*Formerly Renta 4 S.V.S.A et al.) v. Russian Federation*, SCC Case No. 24/2007, Award (20 July 2012) § 48 **[RLA-0171]**; *Sergei Paushok, CJSC Golden East Company & CJSC Vostokneftegaz Company v. Government of Mongolia*, Award on Jurisdiction and Liability (28 April 2011) [hereinafter "*CJSC v. Mongolia*"], § 310 **[RLA-0176]**; *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award (7 July 2011) **[RLA-0178]**; Restatement (Third) of The Foreign Relations Law of the United States, § 712 (1987) **[RLA-0204]**; A.R. Albrecht, *The Taxation of Aliens Under International Law*, 29 Brit. Y.B. Int'l Law 145 (1952) **[RLA-0206]**; Ian Brownlie, *General Course on Public International Law*, 255 Recueil des Cours 143 (1995) **[RLA-0210]**; Louis B. Sohn and Richard Baxter, *Draft Convention on the International Responsibility of States for Injuries to the Economic Interests of Aliens*, *in* Responsibility of States for Injuries to the Economic Interests of Aliens, 55 Am. J. Int'l Law 545, 554 (1961) **[RLA-0234]**.

[563] R-I § 168; *Saluka v. Czech Republic*, § 260 **[CLA-0049]** / **[RLA-0059]**.

[564] R-II § 106; C-II § 225.

[565] R-II § 125; C-II § 235.

[566] R-I § 202; *Methanex v. USA*, § 9 **[RLA-0045]**.

[567] R-I §§ 203 – 204.

382. At the Hearing, Respondent noted that Claimants agreed that the decision to remove the cold meal voucher, which went into effect in 2010, was within the proper prerogative of the State's tax-making authority and that that decision did not violate the BIT.[568]

(i) Existence of a Public Purpose and Tribunal's Question (k) Regarding Social or other Reasons for Reform

383. Although the definition of "*public purpose*" is not well established, economic damage that results from policies regarding public health, safety, morals, welfare, or essential state functions, including anti-trust, consumer protection, environmental protection and land planning, is generally regarded as non-compensable.[569] The 2011 Reform fits within this definition.

384. Claimants ignore that governments must be afforded due deference in defining the issues that affect their public policy or the interests of society as a whole.[570] The Hungarian voucher system is rooted in improving access to food in support of the welfare of the citizenry. The 2011 Reform resulted from critical budget concerns as well as a mandate from the Hungarian electorate and was undertaken for important public and social goals. As part of the 2011 Reform, the SZÉP Card was designed to protect consumers through regulation and technological innovation, as well as to encourage Hungarians to improve their health, among other social purposes.[571] The criteria for the issuance of the SZÉP Card were designed to protect the end-user, as well as other participants in the previously unregulated fringe benefits system.[572] The Erzsébet program is a social benefits program that uses the issuance of vouchers to fund itself, which also aimed to regulate and create a more transparent fringe benefit system. Both measures were constitutional under Hungarian law.[573]

385. The 2011 Reform and the contemporaneous documentation reflecting the discussions and deliberations about the voucher system suggest no nefarious intent. Rather, the available documentation reflects the concerns about achieving the stated voucher objectives. The

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568 Tr. Day 4 at 54:10 – 14 (R. Closing).

569 R-I § 179; R-II § 99; C-II §§ 223, 224, 231 M. Sornarajah, The International Law on Foreign Investment (3d ed. 2004) at 283; 338 **[RLA-0107]**.

570 R-I § 182; *ADC v. Hungary*, § 432 **[CLA-0030]** / **[RLA-0004]**; *Tecmed. v. Mexico*, § 122 **[CLA-0022]** / **[RLA-0068]**.

571 R-I §§ 180 – 181; SZÉP Card Proposal **[R-0008]**; Erzsébet Program, *Erzsébet Program description* **[R-0041]**.

572 R-II §§ 121 – 122; C-I § V(A)(3); SZÉP Card Proposal **[R-0008]**.

573 R-II §§ 123 – 124; Proposal for the Government on the reform of the system of fringe benefits (September 2011) **[R-0015]**; Fundamental Law of Hungary **[RLA-0196]**.

statements of re-election seeking officials, who made their statements when the 2011 Reform was already in place, are not able to reveal the true intention of the government.[574]

386. Although Claimants state that they were ignorant of problems facing the voucher system, the lobby group of which they were a part – AETR – began already in January 2010 to provide proposals on how to "*combat, and sanction, misuse of vouchers*" in light of criticisms that had been presented. AETR recognized the need for regulation and acknowledged that it was in the interest of all "*participants in the sector to ensure that the activities of voucher issuers are regulated*." The clear implication is that, at least by January 2010, fringe benefits were not efficiently serving their purpose.[575] Claimants also admit that they began studying moving to an electronic card ("*dematerialization*") in 2006 because cards enabled a level of governmental oversight that was not possible with paper vouchers. Finding the option too expensive, however, CD Hungary chose not to pursue it.[576]

387. The introduction of the new fringe benefits – the Erzsébet voucher and the SZÉP Card – and the other aspects of the 2011 Reforms, served multiple interrelated economic and social objectives, including the (1) creation of an efficient and secure system, (2) promotion of healthy living and prevention of disease, (3) promotion of domestic tourism and stimulation of economic growth, (4) generation of revenue to fund social welfare programming, (5) elimination of voucher misuse, and (6) enhancement of consumer protection.

388. Regarding (1), the Government aimed to incentivize dematerialization – *i.e.*, the shift to electronic vouchers. Electronic cards would mitigate the problems of lost or expired vouchers by enabling issuers to easily track usage and to compensate employees for lost vouchers.[577] The shift to electronic cards would also contribute to the overall modernization of the Fringe Benefit System and to Hungary generally, by spurring the proliferation of POS machines.[578] The Government also wanted to reduce inefficiencies endemic in the Fringe Benefit System, including those related

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574 R-I §§ 183 – 185; SZÉP Card Proposal **[R-0008]**.

575 R-II §§ 128, 130; C-II §§ 53, 128; Proposal from the AETR concerning the universal regulation of the system for allocating benefits in kind (January 2010) **[C-0145]**.

576 R-II § 129; Internal CD Hungary memorandum, "Outline of situation – cards on the Hungarian market" (18 July 2007) **[C-0134]**; First Nagy Statement, § 44 **[CWS-2]**.

577 RPHB-I §§ 106 – 107; SZÉP Card Proposal, 4 **[R-0008]**; Tr. Day 2 at 106:12-23 (Szatmáry); Tr. Day 2 at 31:15 – 21 (Gans and Nagy).

578 RPHB-I § 107; SZÉP Card Proposal, 12 – 13 **[R-0008]**; Tr. Day 2 at 38:14-25, 39:1-11 (Gans and Nagy).

to commission expenses. The SZÉP Card Issuers are prohibited from charging commissions to employers and employees and may only charge affiliates a fixed commission of 1.5%.[579]

389. Regarding (2), the Government aimed to incentivize and encourage consumer spending on healthy food, and this was encouraged by Hungarian health experts in light of Hungary's significant public health concerns.[580] The connection between the SZÉP Card and the pursuit of health and recreation is clear in the first official SZÉP Card proposal, where the primary objective of the SZÉP Card expressly relates to the promotion of healthy lifestyle. Later proposals made health promotion even more express.[581]

390. Regarding (3), the SZÉP Card was designed to stimulate economic growth in the domestic tourism sector.[582] AETR – Claimants' lobby group – recognized that this was the objective of the SZÉP Card and recognized the authenticity of the Government's efforts and the link between key features of the 2011 Reform and the Government's objectives.[583]

391. Regarding (4) the Erzsébet voucher was introduced as a charity voucher whereby all revenues generated would fund social welfare programs to support impoverished and marginalized groups. Since its inception, hundreds of thousands of Hungarians have benefitted from participation in these social programs and, importantly, these benefits were provided without imposing an additional burden on the Government's budget.[584]

392. Regarding (5), the paper vouchers could be redeemed for products other than their earmarked use and there were concerns about vouchers being sold for cash or in the secondary / "*black*" market.[585] AETR repeatedly recognized issues with the black market and further recognized that

[579] RPHB-I § 108; Tr. Day 2 at 107:7-12) (Michou and Szatmáry); Decree No. 55/2011 at §§ 10(2) – (3) **[RLA-0091]**.

[580] RPHB-I § 103.

[581] *Id*., at §§ 104 – 105; SZÉP Card Proposal, 4 **[R-0008]**.

[582] RPHB-I § 109 – 110; Tr. Day 3 at 31:8-10 (Guller) (*confirming* that the SZÉP Card was intended to promote tourism in Hungary); SZÉP Card Proposal, 4, 22 **[R-0008]**; National Ministry of Economics, Proposal for the Government in Connection with the Amendment of Certain Tax Acts and Other Related Acts (11 October 2011) **[R-0016]**.

[583] RPHB-I § 110 – 111; Letter from the members of the AETR (Mr. Bálint Bessenyey, SodexoPass Hungária Kft., Mr. Pierre Gagnoud, Edenred Magyarország Kft. and Ms. Márta Nagy, Le Chèque Déjeuner Kft.), to Mr. László Trócsány (Ambassador of Hungary to France) (18 October 2012) **[C-0115]**.

[584] RPHB-I § 112; First Guller Statement, § 34 **[RWS-1]**; Tr. Day 3 at 38:2-8 (Guller).

[585] RPHB-I § 113; Tr. Day 2 at 53 (Nagy) (Acknowledging that the electronic voucher enabled better oversight); First Guller Statement, § 21 **[RWS-1]**; Second Nagy Statement, § 21 **[CWS-4]**; Letter from the members of the AETR (Mr. Bálint Bessenyey, SodexoPass Hungária Kft., Mr. Pierre Gagnoud, Edenred Magyarország

an electronic card could enhance security, traceability, and efficiency.[586] The introduction of the electronic voucher card – the SZÉP Card – aimed to fight this corruption and these improper practices.[587] Other countries have sought to incentivize or mandate the use of electronic cards for the same reason.[588] The 2011 Reform introduced processes to monitor compliance with usage rules and to sanction non-compliant affiliates that further contribute to the realization of this goal.[589] Ms. Nagy recognized that this was a goal of the SZÉP Card.[590]

393. Regarding (6), under the 2011 Reform, SZÉP Card Issuers were required to satisfy five criteria and were subject to various regulations, including related to permissible commission rates and the requirement to provide online access to employees to their SZÉP Card's traffic history and current balance. Issuers also have reporting obligations to the Hungarian Trade Licensing Office and the Office is responsible for monitoring the activity of the Issuer and publishing a report every six months. All of these requirements are aimed at enhancing consumer protection by ensuring that Issuers are experienced and subject to regulation.[591]

(ii) Proportionality and the Effect of the Measures

394. Proportionality is not universally recognized as relevant in the expropriation analysis. Claimants have not met their burden of establishing that the doctrine of proportionality is part of the expropriation analysis under Art. 5(2), as they have failed to demonstrate state practice or *opinio juris* (beyond arbitral awards) showing that this standard has been incorporated into customary international law.[592]

Kft. and Ms. Márta Nagy, Le Chèque Déjeuner Kft.), to Mr. László Trócsány (Ambassador of Hungary to France) (18 October 2012) **[C-0115]**.

586 Tr. Day 4 at 63:18 – 21 (R. Closing).

587 RPHB-I § 114; SZÉP Card Proposal, 29 **[R-0008]**.

588 RPHB-I § 115; *see e.g.,* Tr. Day 3 at 94:9 -13 (Nicholson); Belgian Royal Decree laying down the approval conditions and the approval procedure for the issuers of food vouchers in electronic format **[RLA-0197]**.

589 RPHB-I § 116; First Guller Statement, §§ 40 – 42 **[RWS-1]**.

590 RPHB-I § 117.

591 RPHB-I, last page; First Guller Statement, §§ 19, 20 **[RWS-1]**; Decree No. 55/2011 at §§ 8, 13, 16 – 18 **[RLA-0091]**.

592 R-II § 117; C-II §§ 222, 230; *LG&E v. Argentina* Decision on Liability, § 195 **[CLA-0041] / [RLA-0038]**; *Case Concerning Rights of Nationals of the United States of America in Morocco*, Judgment, I.C.J. Reports 1952, 176 (27 August 1952) **[CLA-0115]**; *Azurix v. Argentina*, § 213 **[CLA-0092] / [RLA-0012]**; *Glamis Gold, Ltd. v. United States of America,* UNCITRAL Arbitration, Award (8 June 2009) [hereinafter "*Glamis Gold v. USA*"], **[RLA-0033]**; *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (18 September 2009) [hereinafter "*Cargill v. Mexico*"] **[RLA-0150]**; *Continental Shelf (Libyan Arab*

395. Even if proportionality could be considered to distinguish between dispossession and non-compensable taking, in the investment context, such analysis is limited to whether the means are so disproportionate to the claimed purpose as to call into question the genuineness of the purpose itself. As explained by the tribunal in *Paushok v. Mongolia*, a proportionality analysis cannot be used to second-guess state decision making.[593]

396. The 2011 Reform was necessary to remedy numerous problems in the voucher system and to develop a system that served the purpose for which it was created.[594] The 2011 Reform was specifically targeted to pursue goals within the public interest. These were proportionate in light of (1) the importance of these goals to the Hungarian government and the Hungarian people, (2) the pervasive nature of inefficiencies and violations tainting the previous system, and (3) Claimants having had no legitimate expectation that such measures would not ever be enacted.[595] Claimants' analysis also overlooks that there were more onerous options that were rejected by Respondent. For example, the Government could have closed the market to Claimants by limiting the market to just SZÉP Card Issuers and the MNUA. Instead, however, all issuers were entitled to continue to issue vouchers and a number of vouchers continued to receive favorable tax treatment. This is because the 2011 Reform was aimed to regulate – not abolish – the voucher system. CD Hungary's fellow French issuers continue to operate and issue vouchers in the market.[596]

397. The 2012 UNCTAD Publication on Expropriation confirms that it is inappropriate to transplant the proportionality analyses designed an applied to one particular legal regime to the investment treaty context.[597] The proportionality analysis in investment law is far less onerous and less broad than in the European human rights context or in the CJEU analysis in its 23 February 2016

Jamahiriya v. Malta), 1985 I.C.J. 13 (3 June 1985) **[RLA-0153]**; *Jurisdictional Immunities of the State (Ger. v. It.: Greece intervening)*, 2012 I.C.J. 99 (3 February 2012) **[RLA-0162]**; *S.S. "Lotus" (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10 (September 1927) **[RLA-0177]**; UNCTAD, *Expropriation* (2012) **[RLA-0239]**.

[593] R-I § 186, R-II § 120; *Azurix v. Argentina*, § 311 **[CLA-0092] / [RLA-0012]**; *Deutsche Bank v. Sri Lanka*, § 522 **[RLA-0025]**; *LG&E v. Argentina* Decision on Liability, § 195 **[CLA-0041] / [RLA-0038]**; *Tecmed v. Mexico* **[CLA-0022] / [RLA-0068]**; *Cargill v. Mexico*, § 292 **[RLA-0150]**; *Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award (26 June 2009) [hereinafter "*Invesmart v. Czech Republic*"], § 501 **[RLA-0161]**; *CJSC v. Mongolia*, § 299 **[RLA-0176]**.

[594] R-I § 188.

[595] *Id*., at § 190; R-II § 126; C-II §§ 98, 239, 242.

[596] R-I §§ 188 – 189; R-II §§ 134 – 135; C-II §§ 107, 108; First Nagy Statement, §§ 52 – 53 **[CWS-2]**; First Navigant Report, §§ 243 – 246 **[REX-1]**.

[597] R-II § 119; UNCTAD, *Expropriation* (2012)"] **[RLA-0239]**.

decision.[598] Claimants were not represented in the CJEU proceedings and those proceedings did not consider any alleged "*burden*" on Claimants.[599]

398. To the extent that Claimants argue that "*nobody else is doing it*", Respondent points out that each State is entitled to enact different policies consistent with what they believe to be in the best interests of their citizens. without incurring international legal liability. Further, while in most countries only 20 – 25% of employees use vouchers, in Hungary nearly 80% do, representing a different level of risk and exposure posed by the market.[600] There is significant variation as to how different jurisdictions regulate the issuance of fringe benefit vouchers and many restrict or otherwise regulate the market.[601]

399. Arbitrariness in international law means that "*prejudice, preference or bias is substituted for the rule of law*." To be arbitrary, a measure must have no legitimate purpose.[602] It is necessary to balance two competing interests – the degree of the measures' interference with the right of ownership and the power of the state to adopt its policies.[603] When creating standards, Respondent sought to balance a number of competing needs. It settled on requiring that every issuer have an office in every town of more than 35,000 inhabitants, to balance the need to obtain

[598] R-II § 118; *EC v. Hungary*, CJEU Judgment **[C-0153]**; *LG&E v. Argentina* Decision on Liability **[CLA-0041]** / **[RLA-0038]**; *James v. United Kingdom* **[CLA-0199]**; *Tecmed v. Mexico* **[CLA-0022]** / **[RLA-0068]**.

[599] R-II §§ 127, 141; C-II §§ 97, 239, 243 n. 377; Thomas Elimansberger *Bilateral Investment Treaties and EU Law*, 46 Common Mkt. Law Rev. 383 (2009), 400 – 401 **[RLA-0220]**; Press Release, Explanation of EC Infringement Proceedings for Non-compliance with Community Law, Brussels EC, MEMO/07/343 (5 September 2007) **[RLA-0246]**; First Guller Statement, § II(A)(4) **[RWS-1]**; Szatmáry Statement, § II(A) **[RWS-2]**.

[600] R-II § 131; Wanjek, *Food at Work* (2005) **[RLA-0109]**; First Navigant Report, Figure 4 **[REX-1]**.

[601] R-II § 132; C-II § 92 (bullet 2); Wanjek, *Food at Work* (2005) **[RLA-0109]**; Belgian Royal Decree laying down the approval conditions and the approval procedure for the issuers of food vouchers in electronic format **[RLA-0197]**; French Labor Code, Art. R-3262-37 **[RLA-0198]**; Romanian Law No. 142/1998 of 9 July 1998 on Granting Meal Vouchers **[RLA-0202]**; Romanian Criteria Regarding the Authorization for the Functioning of the Units which Issue Food Vouchers, in force as of 17 August 2015 **[RLA-0203]**.

[602] R-II § 136; *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (14 January 2010) [hereinafter "*Lemire v. Ukraine* Decision on Jurisdiction"], § 263 **[CLA-0220]**; *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award (28 September 2007) [hereinafter "*Sempra v. Argentina*"], § 318 **[RLA-0175]**.

[603] R-I § 187; *LG&E v. Argentina* Decision on Liability, § 189 **[CLA-0041]** / **[RLA-0038]**; *Tecmed v. Mexico*, § 122 **[CLA-0022]** / **[RLA-0068]**.

geographic coverage for clients, users, and affiliates with the cost to potential issuers.[604] This standard is not "*arbitrary*", as Claimants suggest.[605]

400. The SZÉP Card Issuer criteria do not require that an issuer operate as a bank. The law requires that the issuer partner with a bank to ensure that a stable, regulated company can ensure the security of funds. This does not mean, however, that the issuers are subject to the same stringent requirements as is a bank. Even if issuers and banks were to be subject to the same requirements, however, this would not mean that a breach of the BIT had occurred, per *Paushok*.[606]

401. Claimants' allegations with regard to the alleged disproportionality of the Erzsébet voucher likewise fail. The true value of the Erzsébet program is that is a "*self-sufficient, viable project, which can function without state budget resources as an effective social tool in years of economic downturn*." Claimants' argument that social programs should simply be funded by the State exposes their ignorance of the state of the Hungarian economy as of the 2011 Reform. Claimants are also unaided by referencing considerations about a possible solidarity tax, which could not generate as much funds as could be generated through the Erzsébet voucher.[607] The Erzsébet Program was carefully tailored to achieve its goals of ensuring that food is available to the most disadvantaged and marginalized, and that the revenues so generated were put to charitable purposes. The issuance of this voucher by the State-owned MNUA assured that these goals would be prioritized. They were issued for a modest amount (HUF 5,000, approximately EUR 16), above which they no longer attracted a better tax rate than other vouchers, including the hot and cold meal vouchers sold by CD Hungary. The Erzsébet voucher created no competition regarding

[604] R-II §§ 136 – 137; Letter from Mr. Endre Horváth (Deputy Minister of State, responsible for economic development) to Mr. László Balogh (Vice-President, the PSZAF) (15 February 2011) **[C-0148]**; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award (22 May 2007) [hereinafter "*Enron v. Argentina*"], § 281 **[RLA-0030]**; *Cargill v. Mexico* **[RLA-0150]**; Dér Statement, § 44 **[CWS-1]**; Hungary Central Statistical Office, Gazetteer of Hungary (1 January 2012) **[RLA-0243]**.

[605] R-II § 136; C-II § 92.

[606] R-II § 138; Act XCVI of 1993 on Voluntary Mutual Insurance Funds, 6 December 1993, § 2(2)d **[C-0075]**; Email from Ms. Anne Boddaert (Le Chèque Déjeuner) to Mr. Yvon Legrand (Le Chèque Déjeuner) (10 July 2012) **[R-0057]**; *CJSC v. Mongolia* **[RLA-0176]**; Act CCXXXVII of 2013 on Credit Institutions and Financial Enterprises **[RLA-0186]**; Act CXII of 1996 on Credit Institutions and Financial Enterprises **[RLA-0188]**.

[607] R-II §§ 139 – 140; *EC v. Hungary*, CJEU Judgment **[C-0153]**; Email from Mr. Pierre Gagnoud (Edenred) to Mr. Bálint Bessenyey (Sodexo) and Ms. Márta Nagy (16 April 2012) **[C-0154]**; ELFC, *ELFAC Prize 2014* **[R-0030]**; *Cargill v. Mexico* **[RLA-0150]**; Second Witness Statement of Zoltán Guller (20 July 2016) § 2 **[RWS-3]**.

Claimants' cold meal vouchers. For the first quarter of 2012, 20% of Claimants' customers used both Erzsébet and CD Hungary products.[608]

402. Claimants' argument concerning the lack of a transition period for the Erzsébet program does not result in the 2011 Reform being "*obviously disproportionate*."[609] Any start-up issues resulting from a premature beginning to that program would arguably help rather than harm CD Hungary.[610] Typically, all market participants had one month to adapt their business model, so as to capitalize on the year's new tax policy. Here, the Erzsébet voucher was announced in September 2011, giving participants a far longer period than is typically afforded. AETR even had sufficient notice to launch a media campaign criticizing the reforms.[611]

(iii) Discrimination

403. There is some support for the position that "*discrimination*" in the international context, particularly with regard to tax policies, requires differential treatment on the basis of nationality. It is accepted that treating different categories of subjects differently is not unequal treatment.[612] Claimants concede that nationality is not the issue. The 2011 Reform was implemented by the legislature and applicable to any vouchers issued in Hungary, regardless of the nationality of the voucher issuer or the employer or customer who purchased them. The tax law concerned the economy as a whole.[613]

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[608] R-II § 142; R-I § 188; C-II § 98; Proposal for the Government on the reform of the system of fringe benefits (September 2011) **[R-0015]**; Presentation, Hungarian Branch Strategic Meeting, Le Chèque Déjeuner (27 March 2012) **[R-0056] / [NAV-0066]**.

[609] R-II §§ 143, 145; C-II § 99; Letter from Mr. Iván Vetési (President, Central Office for Administrative and Electronic Public Services) to Dr. András Levente Gál (Minister of State, the KIM) (27 September 2011) **[C-0155]**; *LG&E v. Argentina* Decision on Liability **[CLA-0041]** / **[RLA-0038]**; *Invesmart v. Czech Republic*, § 501 **[RLA-0161]**.

[610] R-II § 143; C-II § 99; Letter from Mr. Iván Vetési (President, Central Office for Administrative and Electronic Public Services) to Dr. András Levente Gál (Minister of State, the KIM) (27 September 2011) **[C-0155]**.

[611] R-II § 144; C-II § 124; C-I § 169; AETR meeting minutes (6 October 2011) **[C-0097]**; AETR press release (4 October 2011) **[C-0099]**; AETR press release, "The SZEP Card, is it going to be the first in the class or will it suffer failure in its first year?" (November 2011) **[C-0100]**.

[612] R-II §§ 146 – 147; *Marvin Feldman v. Mexico*, § 170 [**CLA-0013]** / **[RLA-0041]**; *Metalpar S.A. and Buen Aire S.A. v. The Argentine Republic,* ICSID Case No. ARB/03/5, Award on the Merits (6 June 2008) [hereinafter "*Metalpar v. Argentina*"], § 162 **[RLA-0044]**; *CMS Gas v. Argentina* Award, § 293 **[RLA-0152]**; *Sempra v. Argentina*, § 319 **[RLA-0175]**; A.R. Albrecht, *The Taxation of Aliens Under International Law*, 29 Brit. Y.B. Int'l Law 145 (1952) **[RLA-0206]**.

[613] R-II § 149; C-II § 246; C-I § 198.

404. The SZÉP Card Issuer criteria were crafted to ensure that all issuers had adequate size, nation-wide penetration, and sufficient experience in electronic payment systems to effectively implement the new system. Nothing prevents a non-Hungarian issuer from becoming a Card Issuer, and this was not the intent. The three Card Issuers were foreign owned initially, and two still are.[614] That Claimants describe them as "*Hungary-based*" is misleading and confusing – the same term could be applied to CD Hungary.[615]

405. Claimants were not "*in like circumstances to the Beneficiaries*." Unlike Claimants, the enterprises that ultimately issued SZÉP Cards met the SZÉP Card criteria. Hungary did not create the criteria so that only these three issuers could meet the requirement – this was not a results-oriented process and any market operator meeting the conditions would be allowed to issue the Cards.[616] The SZÉP Card proposal of 28 March 2011 does not show that three Hungarian banks were preselected. Rather, it shows that Respondent made efforts to propose criteria that were reasonable and not so restrictive that no one could qualify.[617] The Erzsébet program excludes all issuers because it is a social program and not a market.[618] The taxation structure contains no elements that discriminate between non-Hungarian and Hungarian voucher issuers. Different tax rates applied to different vouchers related to specific government objectives to achieve certain social goals and to stimulate participation.[619] Claimants' allegations of bad faith, including that the measures were taken to drive the French issuers out of the market, are without merit and without factual support.[620]

(iv) Due Process

406. Under customary international law, it is often required that the measure be adopted in accordance with due process.[621] The international law due process analysis requires an investor to have its

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[614] R-I § 198; Letter from Mr. Mihály Varga (Minister of the National Economy) to Mr. Jacques Landriot (CEO, Le Chèque Déjeuner CCR, Legal representative of the President, CD Internationale) (26 July 2013) **[R-0025]**.

[615] R-II § 149.

[616] *Id*., at § 150; C-II §§ 246, 248; Letter from Mr. Mihály Varga (Minister of the National Economy) to Mr. Jacques Landriot (CEO, Le Chèque Déjeuner CCR, Legal representative of the President, CD Internationale) (26 July 2013) **[R-0025]**.

[617] Tr. Day 4 at 60:22 – 25 (R. Closing); SZÉP Card Proposal **[R-0008]**.

[618] R-I § 199; Szatmáry Statement, § 48 **[RWS-2]**.

[619] R-I § 201.

[620] R-II § 152.

[621] R-I § 178.

case reviewed before an independent and impartial body.[622] The judiciary had no role in the present case. Claimants never approached the judiciary, despite being entitled to do so.[623]

407. The 2011 Reform was implemented in accordance with due process because it was proposed, reviewed, and enacted following the well-established Hungarian legislative process by a democratically elected government.[624] The 2011 Reform was the subject of extensive consultation with various Hungarian ministries.[625] This case is distinct from *AIG Capital Partners*.[626] It is not shocking that Claimants were not extensively consulted on the reforms, most of which had no possible bearing on their business.[627]

(v) Duty to Compensate

408. States are entitled to engage in *bona fide* regulation, and Claimants have failed to distinguish between (1) valid non-compensable regulation and (2) indirect expropriation. While international law recognizes a State's duty to compensate for a lawful expropriation, it does not recognize a similar obligation to compensate for the effects of a valid exercise of regulatory powers.[628] Dozens of cases, including *Burlington v. Ecuador*, confirm that adverse effect will not suffice to ground liability, where the measures are within the host State's police powers and the host State has not acted arbitrarily or discriminatorily.[629]

409. The Claimants are not helped by the reasoning in *Santa Elena v. Costa Rica*, which concerned only the amount of compensation due and not whether an expropriation had occurred. In suggesting that *Santa Elena* helps establish a rule that general measures will result in liability and

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622 R-II § 153; *ADC v. Hungary*, § 432 **[CLA-0030]** / **[RLA-0004]**.

623 R-I §§ 194 – 195; R-II § 154; *Generation Ukraine v. Ukraine*, § 20.30 **[CLA-0038]** / **[RLA-0032]**; Act CLI of 2011 on the Constitutional Court **[RLA-0187]**; Act XXXII of 1989 on the Constitutional Court **[RLA-0195]**.

624 R-I § 191; Christoph H. Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, 6 J. World Inv. & Trade 357 (June 2005) **[RLA-0104]**.

625 R-I § 193.

626 *Id*., at § 192; *Generation Ukraine v. Ukraine*, § 20.30 **[CLA-0038]** / **[RLA-0032]**.

627 R-II § 133; C-II §§ 36, 58, § III (3.3); Act CXXXI of 2010 on Participation of the Public in the Preparation of Legislation **[RLA-0191]**.

628 R-II § 107.

629 *Id*., at §§ 107, 115 – 116; Draft Convention on the protection of foreign property, Text with Notes and Comments, OECD (16 October 1967) **[CLA-0212]**; *Burlington v. Ecuador* Decision on Liability, § 471 **[CLA-0008]** / **[RLA-0017]**; Ian Brownlie, Principles of Public International Law 509 (6th ed. 2003) **[RLA-0211]**; Louis B. Sohn and Richard Baxter, *Draft Convention on the International Responsibility of States for Injuries to the Economic Interests of Aliens*, *in* Responsibility of States for Injuries to the Economic Interests of Aliens, 55 Am. J. Int'l Law 545 (1961) **[RLA-0234]**.

an obligation to compensate, Claimants wrongly conflate a lawful expropriation taken for a public purpose and a legitimate exercise of sovereign regulatory power.[630] Claimants' reliance on *Tecmed*, which involved the closure of a landfill in contravention to specific undertakings, similarly falls flat.[631]

(c) Tribunal Considerations and Conclusions

410. At the outset, the Tribunal notes that the second paragraph of Art. 5(2) of the BIT provides expressly that *"any dispossession measures taken shall give rise to the payment of prompt and adequate compensation*[.]*"* The last sentence of Art. 5(3) requires compensation even for dispossessions that result from a State of national emergency, which has not been claimed to exist by Respondent in the present case and indeed did not exist at the time of the 2011 Reform.

411. It is undisputed that no compensation was offered or paid by Respondent after the 2011 Reform. For that reason alone, it is clear that Respondent breached Art. 5(2) of the BIT.

412. Nevertheless, in view of the respective discussions of the Parties, the Tribunal will consider the other criteria that may be relevant for the lawfulness of the dispossessions.

413. It is recalled that Art. 5(2) expressly provides that a dispossession may be permitted "*for reasons of public necessity*[.]" The Tribunal notes that this wording seems to provide a higher threshold than that found in similar BIT provisions requiring that the dispossessing measure must be for "*public purpose*."

414. It is undisputed that the fringe benefit legislation in general was for the public purpose of ensuring a better nutrition and food supply for employees in Hungary. However, as already elaborated above, Respondent's purpose of the 2011 Reform was to exclude the Non-Hungarian issuers from the Hungarian voucher market. Respondent has admitted that the 2011 Reform was intended to keep the profit previously "*realized by foreign-owned companies*" within Hungary.[632] The public

[630] R-II § 112; C-II § 227; *LG&E v. Argentina* Decision on Liability, §§ 194 – 195 **[CLA-0041]** / **[RLA-0038]**; *Desarrollo v. Costa Rica*, §§ 3, 17 – 18 **[CLA-0215]**.

[631] R-II § 113; C-II § 228; *Tecmed v. Mexico*, §§ 115, 119, 145 – 149 **[CLA-0022]** / **[RLA-0068]**; Caroline Henckels, *Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration*, 15 J. Int'l Econ. Law 224 (2012) **[RLA-0224]**.

[632] C-II § 253; Respondent press release, "The Government Launches Social Holidays Programme" (12 January 2012) **[C-0083]**; Dr. Bence Rétvári (State Secretary of the KIM), Speech at the Parliament No 152/90 (12 December 2011) **[C-0119]**; Mr. Miklós Soltész (Ministry of Natural Resources), Speech at the Parliament No

policy goal of keeping profits within the country is not a legitimate public purpose under Art. 5(2) of the BIT.[633]

415. Respondent has not shown that the measures in question were justified on the grounds that they were a "*legitimate exercise of Hungary's general regulatory powers*." The Tribunal has found above that Respondent targeted Claimants' investment. Measures deliberately targeting an investor or three foreign investors cannot be a legitimate exercise of a state's police powers.[634]

416. Taxation measures can also be part of the regulatory powers of the State. However, the Tribunal does not have to decide whether in the present case the taxation measures, which were part of the 2011 Reform, were by themselves confiscatory. As elaborated above, their effect together with the other measures of the 2011 Reform as a package taken by Respondent dispossessed Claimants of the economic value of their investment.

417. Article 5(2) also expressly provides that the dispossession measures must not be "*discriminatory*." While, in view of the lack of compensation in the present case, this criteria is not needed to establish Respondent's breach of Art. 5(2). The Tribunal notes that the above conclusion that the 2011 Reform was intended to and in fact did exclude CD Hungary and the two other foreign investors from the market, also renders the 2011 Reform discriminatory. This was also confirmed by the decision of the CJEU,[635] though the criteria of European law are obviously different.[636]

418. In this context, the Tribunal had raised its Question (b)(a)*: The Relevance, if at all, of EU law to the Parties' respective positions on the application and interpretation of* […] *Article 5 of the France-Hungary BIT.* It is noted that. the Parties agree that EU law has no relevance to the Parties' respective positions on the application and interpretation of Art. 5 of the BIT.[637] The Tribunal agrees. Although Art. 9(3) of the BIT requires the Tribunal to rule in accordance with international law, only breaches of the BIT and not of EU law will give rise to liability in these

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152/161 (12 December 2011) **[C-0120]**; Mr. Miklós Soltész (Ministry of Natural Resources), Speech at the Parliament No 152/165 (12 December 2011) **[C-0121]**.

633 C-I §§ 292 – 294; *ADC v. Hungary*, § 423 **[CLA-0030]** / **[RLA-0004]**.

634 This conclusion is in conformity with the respective reasoning in the *Edenred* Award, 94, as well as *Tecmed v. Mexico* **[CLA-0022]** / **[RLA-0068]** and *ADC v. Hungary* §§ 429 *et seq*. **[CLA-0030]** / **[RLA-0004]**.

635 *EC v. Hungary*, CJEU Judgment, at 32 **[C-0153]**.

636 In this respect, the Tribunal agrees with the same conclusion in the *Edenred* Award, §§ 353 to 355, where more details are provided.

637 CPHB-I § 294; Tr. Day 4 at 86:9-11 (R. Closing).

proceedings. Article 5 of the BIT has no equivalent in the TEU or the TFEU or in secondary EU law such as EU directives or regulations.

419. In view of the above considerations, the Tribunal concludes that Respondent's dispossession of Claimants' investment was not lawful and that, therefore, Respondent breached Art. 5(2) of the BIT.

B. FAIR AND EQUITABLE TREATMENT (ART. 3 OF THE BIT)

420. Article 3 of the BIT provides that:

> *Each Contracting Party shall undertake to accord, in its territory and maritime zones, to investments made by investors of the other Contracting Party, just and equitable treatment, excluding any unjustified or discriminatory measure which might impede their management, maintenance, use, enjoyment or liquidation.*[638]

1. The Legal Standard

(a) Claimants' Arguments

421. Article 3 of the BIT is independent of the customary international law minimum standard of treatment. Had the parties wished to codify the minimum standard of treatment, they could have done so in explicit terms.[639]

422. In interpreting Art. 3 of the BIT, it is necessary to consider (1) the BIT's object and purpose and (2) the meaning of the terms "*fair*" and "*equitable*." The terms "*fair*" and "*equitable*" have been found to mean "*just*", "*even-handed*", "*unbiased*", and "*legitimate*." Article 3 of the BIT specifically excludes "*unjustified or discriminatory*" measures, and such a prohibition is widely

[638] France-Hungary BIT, Art. 3 **[CLA-0001]** / **[RLA-0079]**.

[639] RfA §§ 88 – 90; C-I 314 – 315; § *Vivendi v. Argentina*, § 7.5.4 **[CLA-0021]** / **[RLA-0021]**; *Tecmed v. Mexico*, §§ 155 – 156 **[CLA-0022]** / **[RLA-0068]**; Andrew Newcombe and Lluis Paradell, Law and Practice of Investment Treaties: Standards of Treatment, 1st Edition, Kluwer Law International, 2009, 264 **[CLA-0047]**; Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law, 2nd Edition, Oxford University Press, 2012, 137 **[CLA-0048]**; *Saluka v. Czech Republic*, §§ 294, 309 **[CLA-0049]** / **[RLA-0059]**; *MTD Equity Sdn. Bhd. And MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award (25 May 2004) [hereinafter "*MTD v. Chile*"], §§ 110 – 112 **[CLA-0050]**; Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law, 2nd Edition, Oxford University Press, 2012, 134 **[CLA-0051]**; *RosInvest Co UK Ltd. v. Russia,* CCS No. V/079/2005, Decision on Jurisdiction (1 October 2007) §§ 124-144 **[CLA-0128]**; *Emilio Agustín Maffezini v. Spain,* ICSID Case No. ARB/97/7, Decision on Jurisdiction (25 January 2000) §§ 38 et seq. **[CLA-0126]**.

accepted as being both intrinsic to and more encompassing than the FET standard.[640] When interpreting "*fair and equitable*" in light of the parties' intentions (as reflected in the Preamble to the BIT), other tribunals have found that similar language suggests that the FET standard should be interpreted and applied as a broad and flexible standard of protection. At its most basic level, the FET standard allows tribunals to assess the substantive fairness of the state's treatment of the investor.[641] Article 3 of the BIT prohibits any unreasonable or discriminatory measures which impede the investors' enjoyment of their investment.[642]

423. Legitimate expectations are a substantive protection included in the FET standard, the violation of which is a breach of the FET standard. Legitimate expectations are evaluated at the time the investment is made.[643] These expectations last for the duration of the investment. Claimants could have expected *bona fide* regulatory changes in the meal voucher system (as happened in 2009 and 2010), but could not have expected that an unreasonable and discriminatory package of measures would be adopted by Respondent. Claimants had a permanent right to a legislative

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[640] C-I §§ 316 – 317; *CMS Gas v. Argentina* Award, § 290 **[CLA-0036]**; *Fair and Equitable Treatment, UNCTAD Series on Issues in International Investment Agreements II*, United Nations Conference on Trade and Development (2012) 81 **[CLA-0046]**; *Saluka v. Czech Republic*, § 297 **[CLA-0049] / [RLA-0059]**; *MTD v. Chile*, §§ 113, 196 **[CLA-0050]**; United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations Treaty Series, vol. 1155, 331, Art. 31 **[CLA-0052]**; *National Grid v. Argentina*, § 168 **[CLA-0053]**; Andrew Newcombe and Lluis Paradell, Law and Practice of Investment Treaties: Standards of Treatment, 1st Edition, Kluwer Law International, 2009, 303 **[CLA-0054]**; Andrew Newcombe and Lluis Paradell, Law and Practice of Investment Treaties: Standards of Treatment, 1st Edition, Kluwer Law International, 2009, 289, 301, 303 and 304 **[CLA-0055]**.

[641] C-I §§ 318 – 324; *Vivendi v. Argentina*, § 7.4.4 **[CLA-0021] / [RLA-0021]**; *Saluka v. Czech Republic*, §§ 299 – 301 **[CLA-0049] / [RLA-0059]**; *MTD v. Chile*, § 113 **[CLA-0050]**; *National Grid v. Argentina*, § 170 **[CLA-0053]**; Andrew Newcombe and Lluis Paradell, Law and Practice of Investment Treaties: Standards of Treatment, 1st Edition, Kluwer Law International, 2009, 266 **[CLA-0056]**; Andrew Newcombe and Lluis Paradell, Law and Practice of Investment Treaties: Standards of Treatment, 1st Edition, Kluwer Law International, 2009, 268 **[CLA-0057]**; Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law, 2nd Edition, Oxford University Press, 2012, 132 **[CLA-0058]**; Andrew Newcombe and Lluis Paradell, Law and Practice of Investment Treaties: Standards of Treatment, 1st Edition, Kluwer Law International, 2009, 278 **[CLA-0059]**; Rudolf Dolzer, "Fair and Equitable Treatment: Today's Contour", 12 Santa Clara J. INT'L K.7 (2014) 12 **[CLA-0060]**; *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania, ICSID Case No. ARB/05/20,* Award (11 December 2013) [hereinafter "*Ioan Micula v. Romania*"], § 522 **[CLA-0061] / [RLA-0036]**.

[642] C-I § 325; C-II §§ 271, 293 – 297; France-Hungary BIT, Art. 3 **[CLA-0001] / [RLA-0079]**; *CMS Gas v. Argentina* Award, § 290 **[CLA-0036]**; *Fair and Equitable Treatment, UNCTAD Series on Issues in International Investment Agreements II*, United Nations Conference on Trade and Development (2012) 20 **[CLA-0046]**; *Lemire v. Ukraine* Decision on Jurisdiction, § 259 **[CLA-0220]**.

[643] CPHB-I § 159, 319; *Enron v. Argentina*, § 262 **[RLA-0030]**; Rudolf Dolzer, "Fair and Equitable Treatment: Today's Contours", 12 Santa Clara J. INT'L K.7 (2014) 17 **[CLA-0060]**; *Lemire v. Ukraine* Decision on Jurisdiction, § 264 **[CLA-0220]**; *OAO Tatneft v. Ukraine*, PCA UNCITRAL, Award (29 July 2014) [hereinafter "*OAO v. Ukraine*"] **[CLA-0250]**.

framework that would be fair and transparent.[644] The 2011 Reform frustrated Claimants' legitimate expectations and therefore breached Art. 3 of the BIT.[645]

(b) Respondent's Arguments

424. Article 3 of the BIT obligates signatories to accord investors fairness and equity of treatment, and these terms are often interpreted to mean "*'just', 'even-handed', 'unbiased', and 'legitimate.'*" Tribunals have interpreted the FET standard as protecting an investor's legitimate expectations, as well as prohibiting measures adopted in bad faith. It does not prohibit a signatory from adopting measures that might impede the operation of an investor. It only prohibits those measures that are "*unjustified or discriminatory*."[646]

425. After the Hearing, Respondent explained that Claimants knowingly invested in a system where legislative changes effecting the fundamentals of their investment were likely. Claimants are, thus, unable to use the obligation to afford fair and equitable treatment to obtain a protection they never sought and never received.[647]

2. Whether the 2011 Reform was Reasonable and/or Non-Discriminatory

(a) Claimants' Arguments

426. Claimants had a legitimate expectation that changes to the legal framework of the meal vouchers market would be reasonable and non-discriminatory, and in compliance with Hungary's international obligations under the BIT.[648] Respondent was not free to take any action – it entered into the BIT to open the country to foreign investment and undertook to protect Claimants from "*manifestly inconsistent, non-transparent, unreasonable (i.e. unrelated to some rational policy),*

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[644] CPHB-I § 160.

[645] *Id*., at § 319.

[646] R-I §§ 212 – 214; *Mondev International LTD v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (11 October 2002) **[RLA-0047]**; *Plama Consortium, Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award (27 August 2008) [hereinafter "*Plama v. Bulgaria*"] **[CLA-0063]** / **[RLA-0053]**; *Siemens v. Argentina*, § 290 **[CLA-0028]** / **[RLA-0063]**; France-Hungary BIT, Art. 3 **[CLA-0001]** / **[RLA-0079]**..

[647] RPHB-I § 17.

[648] CPHB-I § 154 – 155, 157 – 158; Tr. Day 4 at 37:14 – 38:18 (C. Closing); Tr. Day 1 at 74:11-16; Andrew Newcombe and Lluís Paradell, Law and Practice of Investment Treaties: Standards of Treatment § 6.26 (Kluwer Law International BV 2009) 279 **[RLA-0101]**; *Saluka v. Czech Republic*, §§ 301, 303 **[CLA-0049]** / **[RLA-0059]**; Rudolf Dolzer, "Fair and Equitable Treatment: Today's Contours", 12 Santa Clara J. INT'L K.7 (2014) 23 **[CLA-0060]**.

or discriminatory (i.e. based on unjustifiable distinctions)" measures.[649] Respondent breached Claimants' legitimate expectation to have a consistent and predictable legal framework applicable to their investment in the Hungarian meal voucher market. Claimants have never submitted that they expected the legal framework would remain unchanged or immutable or that Hungary gave a specific commitment in that regard. Such a specific commitment is not necessary for an expectation to be legitimate.

427. The *Saluka* tribunal held that reasonableness required "*a showing that the State's conduct bears a reasonable relationship to some rational policy*", while the *AES v. Hungary* tribunal held that a reasonable measure involved (1) "[a] *rational policy* [] *taken by a state following a logical (good sense) explanation and with the aim of addressing a public interest matter*" and (2) "*an appropriate correlation between the state's public policy objective and the measure adopted to achieve it*."[650] Respondent agrees that this is the test for reasonableness, and this reasoning has been followed by other tribunals.[651]

428. Respondent misunderstands that, in order to be reasonable, there must be an "*appropriate correlation between the state's public policy objective and the measure adopted*."[652] Respondent's premise that the 2011 Reform was reasonable because it was "*directly correlative to Hungary's public policy objectives*" is fundamentally wrong. As explained by the tribunal in *AES v. Hungary*, correlation alone is insufficient – the measure must also be appropriate

[649] CPHB-I § 156; Memorandum from the Directorate for European Affairs regarding the French-Hungarian Agreement on the Reciprocal Promotion and Protection of Investments, dated 19 December 1986 1 **[RLA-0132]**; *Saluka v. Czech Republic*, § 309 **[CLA-0049]** / **[RLA-0059]**.

[650] C-I §§ 326 – 328; C-II § 272; R-I § 216; *Saluka v. Czech Republic*, § 460 **[CLA-0049]** / **[RLA-0059]**; *AES v. Hungary*, §§ 10.3.8, 10.3.9 **[CLA-0062]**.

[651] C-I § 329; C-II § 272; CPHB-I § 136; R-I § 216; *Saluka v. Czech Republic*, § 460 **[CLA-0049]** / **[RLA-0059]**; *National Grid v. Argentina*, § 197 **[CLA-0053]**; *AES v. Hungary*, §§ 10.3.8, 10.3.9 **[CLA-0062]**; *Plama v. Bulgaria*, § 184 **[CLA-0063]** / **[RLA-0053]**.

[652] C-II § 273.

(proportionate).[653] Proportionality is central to the FET standard.[654] The 2011 Reform was grossly disproportionate.[655]

429. Respondent has failed to demonstrate that the measure was reasonable because it was (1) founded upon a logical explanation and aimed at addressing a matter of public interest or (2) appropriately (or proportionately) correlative to the State's public policy objective. Respondent has failed to prove that the pre-existing voucher system "*was an inefficient and unregulated system that was not achieving the policy objectives for which it was created*", that the system suffered from structural problems, misuse, and economic inefficiencies, and was not achieving and was incapable of achieving the State's alleged public policy objectives. As explained above in reference to "*expropriation*", the 2011 Reform was not appropriately or proportionately correlative to Respondent's alleged public policy objective. Although the success of the 2011 Reform is irrelevant as a matter of law in the reasonableness analysis, audits have shown that the SZÉP Card Issuers have thus far not, contrary to Respondent's assertion, been compliant with the regulations.[656]

430. The unreasonable measures adopted by Respondent impaired Claimants' "*management, maintenance, use, enjoyment or liquidation*" of their investment, breaching both the express prohibition of "*unjustified or discriminatory measures*" and the general FET obligation under Art. 3 of the BIT.[657]

[653] *Id*., at §§ 274 – 276, 278 – 279; *El Paso v. Argentina*, § 373 **[CLA-0025]** / **[RLA-0026]**; *MTD v. Chile*, § 109 **[CLA-0050]**; *AES v. Hungary*, §§ 10.3.9, 10.3.36 **[CLA-0062]**; *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award (8 October 2009) [hereinafter "*EDF v. Romania*"], § 293 **[CLA-0221]**; *Occidental v. Ecuador* ICSID Award, §§ 404, 452 **[RLA-0049]**.

[654] C-II § 276; CPHB-I § 138; *El Paso v. Argentina*, § 373 **[CLA-0025]** / **[RLA-0026]**; *MTD v. Chile*, § 109 **[CLA-0050]**; *Ioan Micula v. Romania*, § 525 **[CLA-0061]** / **[RLA-0036]**; *AES v. Hungary*, §§ 10.3.9, 10.3.36 **[CLA-0062]**; *EDF v. Romania*, § 293 **[CLA-0221]**; *Occidental v. Ecuador* ICSID Award, §§ 404, 452 **[RLA-0049]**.

[655] C-II § 279.

[656] *Id*., at §§ 280 – 284; R-I §§ 53, 59. 220 – 224; "[A]ctivity", Oxford English Dictionary, Oxford University Press, 2015 (accessed 22 October 2015) **[C-0140]**; Letter from Mr. Endre Horváth (Deputy Minister of State, responsible for economic development) to Mr. László Balogh (the PSZAF) (15 February 2011) **[C-0148]**; *EC v. Hungary*, CJEU Judgment **[C-0153]**; Letter from Mr. Iván Vetési (President, Central Office for Administrative and Electronic Public Services) to Dr. András Levente Gál (Minister of State, the KIM) (27 September 2011) **[C-0155]**; *Ioan Micula v. Romania*, § 525 **[CLA-0061]** / **[RLA-0036]**; *AES v. Hungary*, §§ 10.3.8, 10.3.9, 10.3.36 **[CLA-0062]**; SZÉP Card Proposal **[R-0008]**; National Ministry of Economics, Proposal for the Government in Connection with the Amendment of Certain Tax Acts and Other Related Acts (11 October 2011) **[R-0016]**; First Guller Statement, § 16 **[RWS-1]**.

[657] C-II § 285; *Lemire v. Ukraine* Decision on Jurisdiction, § 259 **[CLA-0220]**.

431. The discriminatory nature of the 2011 Reform that Claimants allege in their expropriation analysis is the same conduct as alleged as in violation of the FET, and this is comparable to the unfair treatment suffered in *Saluka*.[658] Different treatment of similarly situated investments is discriminatory unless the state can establish a reasonable basis for the differential treatment.[659] Newcombe and Paradell identify "*unjustifiable or arbitrary regulatory distinctions made between things that are alike or treating unlike things in the same way*" and "*conduct targeted at specific persons or things motivated by bad faith or with an intent to injure or harass*" as discrimination that violates the FET.[660] The Parties agree that "*measures are discriminatory if similarly situated investments are subject to differential treatment without a reasonable basis for the differential treatment*."[661] The 2011 Reform was discriminatory because, even though CD Hungary was in the same economic sector, and was entitled to the same treatment, as the Beneficiaries, the 2011 Reform imposed differential treatment on CD Hungary and the other Non-Hungarian issuers by (1) establishing criteria for the issuance of the SZÉP Cards that could only be met by three Hungary-based banking groups, (2) granting MNUA a monopoly over the issue of Erzsébet vouchers, and (3) introducing a discriminatory tax framework that subjected CD Hungary's meal vouchers to higher tax rates than those imposed on the SZÉP Card and Erzsébet voucher. There was no reasonable justification for the differential treatment.[662]

432. The impact of the measure, rather than the motivation behind it, is determinative of whether a measure is discriminatory.[663] There is also no need to demonstrate discrimination on the basis of nationality – in the absence of justification of the differential treatment of a foreign investor, any

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658 C-I §§ 332 – 333, C-II § 287; *Saluka v. Czech Republic*, §§ 313, 329, 347 **[CLA-0049] / [RLA-0059]**.

659 C-I § 330; C-II § 290; *CMS Gas v. Argentina* Award, § 293 **[CLA-0036]**; *LG&E v. Argentina* Decision on Liability, § 148 **[CLA-0041] / [RLA-0038]**; *Saluka v. Czech Republic*, § 460 **[CLA-0049] / [RLA-0059]**; Andrew Newcombe and Lluis Paradell, Law and Practice of Investment Treaties: Standards of Treatment, 1st Edition, Kluwer Law International, 2009, 289, 304 **[CLA-0064]**; *Nykomb v. Latvia*, 34 **[CLA-0065] / [RLA-0048]**.

660 C-I § 331; Andrew Newcombe and Lluis Paradell, Law and Practice of Investment Treaties: Standards of Treatment, 1st Edition, Kluwer Law International, 2009, 289, 304 **[CLA-0064]**.

661 C-II § 286; R-I § 225; *CMS Gas v. Argentina* Award, § 293 **[CLA-0036]**; *LG&E v. Argentina* Decision on Liability, § 148 **[CLA-0041] / [RLA-0038]**; Andrew Newcombe and Lluis Paradell, Law and Practice of Investment Treaties: Standards of Treatment, 1st Edition, Kluwer Law International, 2009, 289, 304 **[CLA-0064]**; *Nykomb v. Latvia*, 34 **[CLA-0065] / [RLA-0048]**.

662 RfA § 92; C-II § 291; R-I §§ 225, 229; *Saluka v. Czech Republic* **[CLA-0049] / [RLA-0059]**; *Nykomb v. Latvia*, 34 **[CLA-0065] / [RLA-0048]**; *GAMI Investments, Inc. v. The Government of the United Mexican States*, NAFTA Chapter 11 and UNCITRAL, Final Award (15 November 2004) [hereinafter "*GAMI v. Mexico*"], §§ 285 – 290 **[RLA-0031]**.

663 C-II §§ 288 – 289; *Siemens v. Argentina*, § 460 **[CLA-0028] / [RLA-0063]**.

differential treatment is discriminatory.[664] Respondent's treatment of Non-Hungarian Issuers was so disadvantageous that it enabled the SZÉP Card Issuers and MNUA – within one year – to take over the voucher market.[665] The only goal of the new tax policy provided in the 2011 Reform was to exclude the Non-Hungarian Issuers from the voucher market, and no reasonable justification can be provided for this differential treatment. The 2011 Reform thus fails to fulfill the most basic requirements of reasonableness and non-discrimination included in the FET standard as defined by Art. 3 of the BIT.[666]

433. Respondent's justifications for the 2011 Reform were both self-serving and after the fact. First, Respondent failed to demonstrate that there even were problems for the 2011 Reform to resolve. Even if they did exist, however, the measures used by Respondent were not appropriately tailored to the alleged public policy pursued, and were adopted without due regard for the investor.[667] Second, even assuming that income was being diverted from the intended beneficiaries (which is denied), Respondent misrepresents how the voucher system works in order to reach that conclusion: (1) Claimants never received subsidies from Hungary; (2) commissions are not a diversion of income (as the employers benefitted from the exemption irrespective of the commissions); and (3) there was no correlation between the amount of the commissions and the extent of the 2011 Reform.[668] Third, Respondent's alleged goal of "*efficiency, security and accessibility*" does not explain the strict criteria for the issuance of the SZÉP Card and the introduction of preferential tax treatment.[669] Fourth, the alleged goals of health and nutrition promotion were already fulfilled by the meal voucher system prior to the 2011 Reform.[670] Fifth, the alleged "*welfare*" purpose of the Erzsébet voucher does not explain why it needed to be created as a monopoly, at the expense of Claimants.[671]

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[664] C-II § 290; *Saluka v. Czech Republic*, § 460 **[CLA-0049]** / **[RLA-0059]**.

[665] C-I § 334.

[666] *Id*.; C-II §§ 285, 292; *see also* CPHB-I §§ 140 – 146; France-Hungary BIT, Art. 3 **[CLA-0001]** / **[RLA-0079]**; *Lemire v. Ukraine* Decision on Jurisdiction, § 259 **[CLA-0220]**.

[667] CPHB-I §§ 140 – 141; Proposal from the AETR concerning the universal regulation of the system for allocating benefits in kind (January 2010) **[C-0145]**; *Ioan Micula v. Romania*, § 525 **[CLA-0061]** / **[RLA-0036]**.

[668] CPHB-I § 142; Claimants' Opening, slide 2; Szatmáry Statement, § 19 **[RWS-2]**; Tr. Day 2 at 106:1-16 (Szatmáry); *Edenred* Award at § 266.

[669] CPHB-I § 143; Tr. Day 2 at 161:24 – 25.

[670] CPHB-I § 144; Tr. Day 3 at 23:6-13 (Guller); *compare* R-I § 81; Respondent's Opening, Slide 28.

[671] CPHB-I § 145; Email from Mr. Pierre Gagnoud (Edenred) to Mr. Bálint Bessenyey (Sodexo) and Ms. Márta Nagy (16 April 2012) 2 ("scenario 2") **[C-0154]**.

(b) Respondent's Arguments

434. Claimants bear the burden of proving that proportionality is part of Respondent's obligation under the FET standard, as a matter of customary international law. Claimants cannot satisfy this burden by looking to *ad hoc* arbitral awards, but rather must point to general and consistent practice of States that flow out of a sense of legal obligation.[672] Claimants' sole support for the existence of the proportionality requirement is a passage from *EDF v. Romania*, which cites cases that refer to proportionality not as part of the FET standard but as part of the expropriation analysis.[673]

435. The standard of "*reasonableness*" requires a showing that the State's conduct bears a reasonable relationship to a rational policy. This two-part definition requires that (1) "*a rational policy is taken by a state following a logical (good sense) explanation with the aim of addressing a public interest matter*", and (2) "*an appropriate correlation between the state's public policy objective and the measure adopted to achieve it*."[674] Respondent's policy objectives with respect to the 2011 Reform were to (1) achieve the social benefits for which the voucher system was intended and stimulate the economy, and (2) eliminate the problems and inefficiencies that had otherwise plagued the use of fringe benefits in the past.[675] As the recent award in *Bilcon v. Canada* made clear, Respondent is not required to show that the measures were perfect in their design or implementation.[676]

436. The 2011 Reform was a rational policy measure adopted by Respondent pursuant to a logical explanation aimed at addressing specific public interest matters. The voucher system was no longer serving the purpose for which it was created, it had no regulatory oversight, and it presented risks for consumers. The State was also forfeiting PIT revenues in the form of tax benefits that were being redirected away from intended recipients. Thus, the policy underlying the 2011 Reform was rational: Respondent sought to reform the voucher system (a system aiming to address public interest concerns including stimulating economic growth, consumer protection,

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[672] R-II §§ 224 – 225; C-II § 276.

[673] R-II § 226; *James v. United Kingdom* **[CLA-0199]**; *EDF v. Romania*, § 293 **[CLA-0221]**; *Azurix v. Argentina*, § 311 **[CLA-0092]** / **[RLA-0012]**.

[674] R-I §§ 215 – 216; R-II § 229; *AES v. Hungary*, §§ 10.3.8, 10.3.9 **[RLA-0005]**; *Saluka v. Czech Republic*, § 460 **[CLA-0049]** / **[RLA-0059]**.

[675] R-II § 229.

[676] *Id*., at § 228; *GAMI v. Mexico*, § 114 **[RLA-0031]**; *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, PCA Case No. 2009-04, Award (17 March 2015) § 437 **[RLA-0181]**.

public health, and public welfare, among others), such that it efficiently and effectively achieves the governmental objectives while eliminating the problems in the previous system.[677]

437. There is an appropriate correlation between the public policy objective and the measures adopted.[678] Here, problems with the old system included (1) lack of voucher regulation, (2) the misuse of vouchers as a cash equivalent, (3) the emergence of a secondary market, and (4) voucher issuers' interest in unredeemed vouchers and high commission rates diverting the tax benefit away from the intended recipients. The new system has addressed each of these issues. SZÉP Card Issuers must satisfy particular criteria to become Card Issuers and are limited in the amount of commission that they can charge. Audits confirm that Issuers are complying with the requirements, meaning that the tax benefits are still being enjoyed by the intended beneficiaries. The shift to electronic vouchers also precludes their use as a cash-equivalent and their resale in a secondary market. The Erzsébet voucher has also achieved its social objectives of improving access to affordable food for Hungarian workers, and hundreds of thousands of marginalized, impoverished, and otherwise disadvantaged people have benefitted from the revenue generated through this program.[679]

438. Measures are discriminatory if similarly situated investments are subject to differential treatment without a reasonable basis. The 2011 Reform does not discriminate against Claimants in violation of Art. 3 of the BIT.[680] There is no regulatory distinction between foreign and domestic voucher issuers. There are no nationality requirements for participating in the voucher system and there is nothing preventing a foreign company from being permitted to issue SZÉP Cards. The first three companies to issue SZÉP Cards were foreign-owned when they became Issuers.[681] Regarding taxation, there is no discriminatory treatment between like entities and no discrimination based on nationality. Rather, taxation rates distinguished on the basis of the type of good or service for which the voucher was redeemable. The tax scheme, like all tax schemes, was designed to encourage certain spending and consumption habits in support of economic and social goals. All SZÉP Cards are taxed at the same rate of 35.7%. All other employer

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677 R-I §§ 218 – 220; R-II § 229.

678 R-I § 220.

679 *Id.*, at §§ 220 – 224.

680 R-I §§ 225 – 228; R-II §§ 255, 256; C-I §§ 157, 288; C-II § 290 – 291; *CMS Gas v. Argentina* Award, § 293 **[RLA-0020]**; *LG&E v. Argentina* Decision on Liability, § 148 **[CLA-0041]** / **[RLA-0038]**; *Saluka v. Czech Republic* **[CLA-0049]** / **[RLA-0059]**.

681 R-I § 228.

contributions that serve a social benefit (school assistance, health insurance, pension funds, local transit passes) are taxed at the same rate as SZÉP Cards and Erzsébet vouchers. All other vouchers are taxed at 51.17%, which is preferential treatment as compared with the tax rates applied in the PIT. If Claimants had chosen to issue any voucher except the Erzsébet voucher, they would have been taxed at the same rate as the other issuers.[682]

439. Participation in the same economic sector is a relevant but insufficient consideration to assess whether something is entitled to the same treatment.[683] Hot and cold meal vouchers have historically had different tax treatment. The SZÉP Card and the Erzsébet voucher offer advantages and serve different purposes than CD Hungary's meal vouchers. Claimants' claim of discrimination falters because discrimination requires differential treatment between things in like circumstances, and CD Hungary's product was not sufficiently similar to the SZÉP Card or the Erzsébet voucher. The SZÉP Cards are more secure and more efficient, involve lower commissions and bear the cost of education of the Hungarian market regarding the products. CD Hungary has never issued either the SZÉP Card or the Erzsébet voucher and, accordingly, was never "*subject to the same laws and regulations*" as either SZÉP Card Issuers or MNUA. Any differential treatment was objective, rational, and established pursuant to Hungary's general regulatory powers.[684] These are products with an inherent public value that the Government wants to encourage and promote *via* its tax policy. The Government also rationally uses its tax policy to encourage people to use Erzsébet vouchers, to generate more revenue for social programs.[685] That CD Hungary's customers chose the Erzsébet voucher over CD Hungary's products does not reflect pressure – it reflects that customers, logically and predictably, place value on a product that would be used for charitable purposes.[686] The Erzsébet voucher excludes

682 *Id*., at § 229; R-II §§ 246 – 247; compare C-II §§ 249, 291, *citing Nykomb v. Latvia*, 34 **[CLA-0065]** / **[RLA-0048]** ("*subject to the same laws and regulations*").

683 R-II § 244; *Cargill v. Mexico*, §§ 195, 206 **[RLA-0150]**.

684 R-II §§ 242, 245.

685 *Id*., at §§ 248 – 250; C-II § 291; Extract from Internal CD Hungary presentation (31 October 2006) [**C-0043]**; Extract from Internal CD Hungary presentation (22 June 2009) **[C-0062]**; Internal CD Hungary memorandum, "Outline of situation – cards on the Hungarian market" (18 July 2007) **[C-0134]**; First Data, *Prepaid Card Issuing and POS Acquiring Services Indicative* Proposal (4 July 2011) **[R-0011]**; *Marvin Feldman v. Mexico*, § 113 [**CLA-0013]** / **[RLA-0041]**.

686 R-II § 251; R-I § 202; Second Navigant Report, § 48 **[REX-2]**; Taiyuan Wang and Pratima Bansal, *Social Responsibility in New Ventures: Profiting from a Long-Term Orientation*, 33 Strategic Mgmt. J. 1135 (February 2012) **[RLA-0237]** / **[NAV-0049]**.

all issuers, and the regime is no different from that prior to the 2011 Reform, where the Holiday voucher was issued exclusively by MNUA.[687]

440. The 2011 Reform neither targeted non-Hungarian voucher issues nor was it motivated by bad faith or intent to injure. While Respondent acknowledges that CD Hungary does not meet the criteria to be a SZÉP Card Issuer, it is preposterous to deduce that the standards were designed with this outcome in mind. The 28 March 2011 proposal for the SZÉP Card explains the rationale behind the standards. All aspects of the criteria are objectively defendable as improving the functioning of the voucher system and this is confirmed by the contemporaneous internal governmental documentation – far more so than Claimants' reliance on a handful of public statements by politicians.[688] The Erzsébet voucher did not create a monopoly over cold meal vouchers, which CD Hungary was able to continue to issue.[689] There was no aim to exclude CD Hungary from the market.[690] Respondent's refusal to adopt Claimants' proposal when it was weighing conflicting interests and priorities in developing the 2011 Reform, does not mean that Respondent "*chose to ignore*" alternatives or chose to exclude Claimants.[691] The market involved a variety of taxpayers and participants, including the employers and employees who were the target of the legislation as both the main end-users and the tax payers. The Government worked with all stakeholders, including Ms. Nagy, to make the system more efficient and effective in serving its goals.[692]

441. Contemporaneous evidence demonstrates the baselessness of the claim that the 2011 Reform was designed to exclude CD Hungary. The 15 February 2011 letter from Mr. Endre Horváth (Deputy Ministry) provided comments on the proposed SZÉP Card and asked that the PSZAF "*review these terms and conditions, which may be too tight in their current form and to make a proposal to ease them to ensure that potentially the 2-3 largest actors should be able to comply with them*."[693] The Government considered the three largest foreign-owned and three largest Hungarian banks and created a list such that at least three companies – irrespective of nationality

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687 R-II § 255; C-I §§ 157, 288; C-II § 291.

688 R-I §§ 230 – 232; R-II § 253; SZÉP Card Proposal **[R-0008]**; Szatmáry Statement, §§ 29 – 43 **[RWS-2]**.

689 R-II § 254.

690 *Id*., at §§ 234, 240; C-II § 232.

691 R-II § 233; C-II § 282.

692 RPHB-I §§ 11 – 16.

693 R-II § 235; Letter from Mr. Endre Horváth (Deputy Minister of State, responsible for economic development) to Mr. László Balogh (Vice-President, the PSZAF) (15 February 2011) **[C-0148]**.

– could qualify as issuers. The 28 February 2011 letter from Mr. László Balogh focused on helping more entities to become SZÉP Card Issuers and proposed relaxing the requirements. The SZÉP Card Proposal noted that the Government was attuned and sought to avoid requirements that were not properly justified, and this undermines Claimants' argument that the Government disregarded the consequences of their policies.[694] The October 2011 proposal merely acknowledges that "*as of 1 October 2012, ready-to-eat meal vouchers would be issued by the issuer appointed by the governmental decree provided under the authorization of the [PIT]*."[695]

442. Many of Claimants' arguments repeat those made in reference to their expropriation claim. Claimants' claims, however, do not show that there was anything "*unreasonable*" about requiring that the Erzsébet voucher only be issued by a state entity, nor do they challenge the "*unreasonableness*" of the SZÉP Card Issuer criteria. That the 2011 Reform was unique within the EU is of no significance and the comparison between Belgium and France (which have meal voucher rates of 25% and 10.5%, respectively) and Hungary (meal voucher rate of 80%) is inapt. Given the usage, it is reasonable for Respondent to want greater regulatory oversight in comparison to countries whose populations are less dependent on meal vouchers.[696]

3. Whether Respondent Acted in Good Faith

(a) Claimants' Arguments

443. The FET standard overlaps considerably with the meaning of good faith.[697] As confirmed in *Tecmed*, FET is "*an expression and part of the bona fide principle recognized in international law, although bad faith from the State is not required for its violation*."[698] Bad faith, however, violates the FET standard, in particular when a state uses its legislative or executive power to

[694] R-II §§ 236 – 238; C-II § 282; Letter from Mr. László Balogh (Vice-President, the PSZAF) to Mr. Endre Horváth (Deputy Minister of State, responsible for economic development) (28 February 2011) **[C-0149]**; SZÉP Card Proposal, 11 **[R-0008]**.

[695] R-II § 239; National Ministry of Economics, Proposal for the Government in Connection with the Amendment of Certain Tax Acts and Other Related Acts (11 October 2011) **[R-0016]**.

[696] R-II §§ 329 – 332; C-I § 396, CD Hungary's exceptional Costs, November 2014 § 6.3.3 **[AC-45]**; Sergey Ripinsky and Kevin Williams, Damages in International Investment Law, §§ 5.1, 5.4 and 5.52 (2008) **[RLA-0232]**.

[697] C-I §§ 335 – 336; Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law, 2nd Edition, Oxford University Press, 2012, 132 **[CLA-0058]**.

[698] C-I § 337; *Tecmed v. Mexico*, § 153 **[CLA-0022]** / **[RLA-0068]**.

harm or destroy a foreign investment.[699] State action that is intended to harm a foreign investment is not FET.[700] As stated in *Vivendi* (citing *Frontier Petroleum Services Ltd. v. Czech Republic*), host States have an obligation not to purposefully inflict damage upon an investment.[701] This is different from a "*do no harm*" standard, which Claimants do not advocate.[702] The present case is an example of an expulsion of an investment based on local favoritism. Far from doing no harm, Respondent used its powers of taxation to purge an entire market of foreign investors in violation of Art. 3 of the BIT.[703]

444. Respondent's contention that the documentary evidence shows that excluding or inflicting harm on foreign companies was not a consideration in the decision-making process is incorrect. Rather, the documentary evidence indicates that such exclusion was a consideration or factor. This was obvious from (1) the criteria for the SZÉP Card that were selected so as to allow only three banking groups to meet the requirements, thereby admitting that the standards were designed to exclude Claimants, (2) Respondent's knowledge that the 2011 Reform would displace non-Hungarian Issuers, and (3) Respondent's desire that 100% of the profit remain in Hungary.[704]

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699 C-I §§ 338 – 340; Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law, 2nd Edition, Oxford University Press, 2012, 156 **[CLA-0066]**; Andrew Newcombe and Lluis Paradell, Law and Practice of Investment Treaties: Standards of Treatment, 1st Edition, Kluwer Law International, 2009, 277 **[CLA-0067]**; *Frontier Petroleum Services Ltd. v. Czech Republic*, UNCITRAL, Award (12 November 2010) [hereinafter "*Frontier v. Czech Republic*"], § 300 **[CLA-0068]**.

700 C-II §§ 298, 299, 307; Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law, 2nd Edition, Oxford University Press, 2012, 156 **[CLA-0066]**; Andrew Newcombe and Lluis Paradell, Law and Practice of Investment Treaties: Standards of Treatment, 1st Edition, Kluwer Law International, 2009, 277 **[CLA-0067]**.

701 C-I § 341; C-II §§ 300 – 303; *Vivendi v. Argentina*, § 7.5.39 **[CLA-0021] / [RLA-0021]**; Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law, 2nd Edition, Oxford University Press, 2012, 156 **[CLA-0066]**; Andrew Newcombe and Lluis Paradell, Law and Practice of Investment Treaties: Standards of Treatment, 1st Edition, Kluwer Law International, 2009, 277 **[CLA-0067]**; *Frontier v. Czech Republic*, § 300 **[CLA-0068]**.

702 C-II §§ 303 – 304; Andrew Newcombe and Lluis Paradell, Law and Practice of Investment Treaties: Standards of Treatment, 1st Edition, Kluwer Law International, 2009, 277 **[CLA-0067]**; *Frontier v. Czech Republic*, § 300 **[CLA-0068]**; *Parkerings-Compagniet AS v. Republic of Lithuania,* ICSID Case No. ARB/05/8, Award (11 September 2007) [hereinafter "*Parkerings v. Lithuania*"], § 332 **[RLA-0051]**.

703 C-I § 342; Dr. Bence Rétvári (State Secretary of the KIM), Speech at the Parliament No 152/90 (12 December 2011) **[C-0119]**; Mr. Miklós Soltész (Ministry of Natural Resources), Speech at the Parliament No. 152/161 (12 December 2011) **[C-0120]**.

704 C-II § 305; Dr. Bence Rétvári (State Secretary of the KIM), Speech at the Parliament No. 152/90 (12 December 2011) **[C-0119]**; Mr. Miklós Soltész (Ministry of Natural Resources), Speech at the Parliament No. 152/161 (12 December 2011) **[C-0120]**; Mr. Miklós Soltész (Ministry of Natural Resources), Speech at the Parliament No. 152/165 (12 December 2011) **[C-0121]**; Letter from Mr. László Balogh (Vice President, the PSZAF) to Mr. Endre Horváth (Deputy Minister of State, responsible for economic development) (28 February 2011) **[C-**

445. Respondent has failed to refer to any "*contemporaneous internal government documents*" that would support their arguments. Rather, the contemporaneous internal government documents reveal that the exclusion of CD Hungary and other market participants was a consideration in the development and implementation of the 2011 Reform. The relevant public statements are attributable to Respondent and evidence the motivation and intent to inflict economic harm on Claimants' investment.[705]

(b) Respondent's Arguments

446. Although showing that the host state acted in bad faith is not a required element of the FET standard, proving that measures were taken in bad faith is sufficient to substantiate a claim.[706] "*Good faith*" is a broad standard that eludes strict definition. Bin Cheng explained that "*performance of a treaty obligation in good faith means carrying out the substance of this mutual understanding honestly and loyally*."[707] The tribunal in *Micula* reasoned that at "*minimum, good faith would require that any party would not consciously conduct itself in such a way that should contradict the implications of that party's earlier behavior*."[708] Claimants' suggestion, as per *Vivendi*, that a "*do no harm*" standard should apply would broaden the FET standard beyond the language of this BIT and of investment treaty interpretation generally. The tribunal in *Vivendi* was referring to the government's obligation not to disparage and undercut a concession and there was no indication that this reasoning should be adopted in situations where there is no contractual relationship between the host state and the investor. BITs do not guarantee the profitability or

0149]; SZÉP Card Proposal, 10 – 11 **[R-0008]**; National Ministry of Economics, Proposal for the Government in Connection with the Amendment of Certain Tax Acts and Other Related Acts (11 October 2011) 9 **[R-0016]**.

705 C-II § 306; Dr. Bence Rétvári (State Secretary of the KIM), Speech at the Parliament No. 152/90 (12 December 2011) **[C-0119]**; Mr. Miklós Soltész (Ministry of Natural Resources), Speech at the Parliament No. 152/161 (12 December 2011) **[C-0120]**; Mr. Miklós Soltész (Ministry of Natural Resources), Speech at the Parliament No. 152/165 (12 December 2011) **[C-0121]**; National Ministry of Economics, Proposal for the Government in Connection with the Amendment of Certain Tax Acts and Other Related Acts (11 October 2011) 9 **[R-0016]**; *El Paso v. Argentina*, § 373 **[CLA-0025]** / **[RLA-0026]**.

706 R-I § 233; *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award (25 June 2001) **[RLA-0007]**; *Glamis Gold v. USA*, § 616 **[RLA-0033]**.

707 R-I § 234; Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals (Grotius Publications Ltd. 1987) **[RLA-0093]**.

708 R-I § 234; *Ioan Micula v. Romania*, § 831 **[CLA-0061]** / **[RLA-0036]**.

success of an investment, and no signatory to a BIT would expect that they must constrain their legislative actions to "*do no harm*" to an investor.[709]

447. Respondent did not conspire or intend to inflict harm on Claimants, and Claimants' efforts to manufacture such motives fall flat.[710] Claimants rely on isolated comments made by members of Parliament after the implementation of the 2011 Reform began to substantiate their claims. These statements are irrelevant as they were not made while the 2011 Reform was being considered and drafted.[711] Contemporaneous evidence and the statements cited show an intent to use a tool of economic policy to generate revenue and to further social welfare goals, including those related to health and nutrition, while dealing with the limits of public funds.[712]

448. The 12 December 2011 speech by Dr. Bence Rétvári about the Erzsébet voucher, cited by Claimants, contains no indication about intent or taking profits or market share from private foreign companies and giving them to similarly situated domestic companies.[713] The focus is on the limited resources available to finance public initiatives and on Respondent's utilization of the Erzsébet voucher as a means to finance certain projects.[714] The most clear expression of the justifications for the Erzsébet program is contained in the first article of Act CIII of 2012, which designates the charitable purpose of the voucher and regulated the obligations of MNUA.[715] This was reiterated by Dr. Retvari when he presented the same to Parliament.[716]

4. Legitimate Expectations in the FET Standard

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709 R-I § 236; *Vivendi v. Argentina*, § 7.4.39 **[CLA-0021]** / **[RLA-0021]**; *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AG)/04/6, Award (16 January 2013) § 222 **[RLA-0074]**.

710 R-II § 263; RPHB-I §§ 11 – 16.

711 R-I § 235; R-II § 257; C-II § 257; SZÉP Card Proposal **[R-0008]**; Proposal on the modification of government decree 55/2011 (IV.12) on the rules of issuance and usage of Széchenyi Recreational Card (18 July 2011) **[R-0012]**; Proposal for the Government on the reform of the system of fringe benefits (September 2011) **[R-0015]**; Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law (Oxford University Press 2008) **[RLA-0094]**.

712 R-II § 258; C-II §§ 8, 305, 319.

713 R-II §§ 259 – 260; C-II § 110; Speech No. 152/90 by Dr. Bence Rétvári (Plenary Session of Parliament) (12 December 2011) **[R-0055]**.

714 R-II § 260.

715 *Id.*, at § 261; Act CIII of 2012 on The Erzsébet Project (6 July 2012) **[C-0114]**.

716 R-II § 262; Speech No. 211/324 by Dr. Bence Rétvári (Plenary Session of Parliament) (2 July 2011) **[R-0052]**.

(a) Claimants' Arguments

449. Legitimate expectations are the dominant element of the FET standard.[717] There are three forms of legitimate expectation: (1) those arising from the foreign investor's reliance on specific host State conduct, (2) that of a stable and predictable legal and administrative framework that meets certain minimum standards (which does not require a particular promise on the part of the host State[718]), and (3) the expectation that the host State will comply with its IIA obligations.[719] Respondent's assertion that this is a high standard relies on a narrow reading of the awards in *Parkerings*, *Metalpar*, *GAMI*, and *Feldman*. The *Parkerings* tribunal observed that, although an expectation that the legislative framework will never change will only be legitimate in the face of a stabilization clause, investors have a right to "*a certain stability and predictability*", which encompasses the expectation that the host state will conduct itself in a lawful manner.[720] Under *Feldman*, the absence of "*definitive, unambiguous and repeated*" assurances does not preclude a finding of unfair and inequitable treatment. The present dispute is different from *GAMI*, as "*the Claimants' legitimate expectations were founded (in large part) upon express and unequivocal undertakings by the Respondent*."[721]

450. The exercise of regulatory power is predictable, but the abuse of the same is not. Likewise, deliberate breach of international obligations is not foreseeable. By adopting unreasonable and discriminatory measures that knowingly inflicted economic harm on CD Hungary, Respondent – through the 2011 Reform – breached Claimants' legitimate expectations of predictability and stability.[722] Claimants were entitled to expect that Respondent would implement its policies in a

[717] C-I § 343; *Saluka v. Czech Republic*, § 302 **[CLA-0049]** / **[RLA-0059]**.

[718] C-II § 315; *Metalpar v. Argentina*, §§ 164, 186, 188 **[RLA-0044]**.

[719] C-II §§ 312 – 316; R-I §§ 238, 241; *Marvin Feldman v. Mexico*, §§ 141, 148, 209 – 210 **[CLA-0013]** / **[RLA-0041]**; *GAMI v. Mexico*, § 76 **[RLA-0031]**; *Metalpar v. Argentina*, §§ 164, 186, 188 **[RLA-0044]**; *Parkerings v. Lithuania*, §§ 332 – 333 **[RLA-0051]**; Andrew Newcombe and Lluís Paradell, Law and Practice of Investment Treaties: Standards of Treatment § 6.26 279 – 280 (Kluwer Law International BV 2009) **[RLA-0101]**.

[720] C-II § 315; *Parkerings v. Lithuania*, §§ 332 – 333 **[RLA-0051]**; Andrew Newcombe and Lluís Paradell, Law and Practice of Investment Treaties: Standards of Treatment § 6.26 279 – 280 (Kluwer Law International BV 2009) **[RLA-0101]**.

[721] C-II § 315; *GAMI v. Mexico*, § 76 **[RLA-0031]**.

[722] C-II §§ 334 – 338, 340; Proposal from the AETR concerning the universal regulation of the system for allocating benefits in kind (January 2010) **[C-0145]**; *El Paso v. Argentina*, § 402 **[CLA-0025]** / **[RLA-0026]**; *Saluka v. Czech Republic*, §§ 309, 329, 337 **[CLA-0049]** / **[RLA-0059]**; *Ioan Micula v. Romania*, § 525 **[CLA-0061]** / **[RLA-0036]**; *AES v. Hungary*, § 10.3.9 **[CLA-0062]**; *James v. United Kingdom* **[CLA-0199]**; *Lemire v. Ukraine* Decision on Jurisdiction, § 259 **[CLA-0220]**; *EDF v. Romania*, § 293 **[CLA-0221]**.

lawful and non-discriminatory manner. The adoption of openly discriminatory and unreasonable measures was not foreseeable.[723]

451. Claimants do not submit that Respondent made a "*specific commitment to the Claimants with regard to the continuation of the pre-2011 voucher system*" and they do not dispute Respondent's right to regulate "*in accordance with the BIT*."[724] In making their investment, Claimants reasonably relied on their expectation that Respondent would maintain a certain stability and predictability in the applicable legal environment. At the time, the BIT promising to "*open up the country to foreign investment*" was in place and Hungary was in the process of joining the EU. Both the BIT and the Europe Agreement were critical to Claimants' decision to invest, and obliged Respondent to refrain from adopting disproportionate and discriminatory measures, such as the 2011 Reform. Respondent's adoption of the 2011 Reform was disproportionate and discriminatory and, therefore, was in violation of Claimants' legitimate expectations of stability and predictability.[725]

452. The State's actions and the investor's expectations must be examined in the light of all of the circumstances, taking into account both sides' legitimate interests.[726] The issue is not whether a specific commitment has been violated, but rather whether the measures adopted exceeded the normal regulatory powers of the state and violated the legitimate expectations of the investor.[727] The investor's "*right to a certain stability and predictability of the legal environment of the*

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723 C-II § 339; *Saluka v. Czech Republic*, § 329 **[CLA-0049] / [RLA-0059]**.

724 C-II § 308 – 311, 317 – 319; R-I § V.B.5, § 237, 243, 245, 247; *El Paso v. Argentina*, § 364 **[CLA-0025] / [RLA-0026]**; *CMS Gas v. Argentina* Award, § 277 **[CLA-0036]**; *LG&E v. Argentina* Decision on Liability, § 125 **[CLA-0041] / [RLA-0038]**; *Saluka v. Czech Republic*, § 303 **[CLA-0049] / [RLA-0059]**; *Ioan Micula v. Romania*, § 528 **[CLA-0061] / [RLA-0036]**; *Parkerings v. Lithuania*, §§ 332 – 333 **[RLA-0051]**.

725 C-I § 350, C-II §§ 329 – 332; CD Hungary, "CD Hungary Movements in share capital (HUF)" (2 July 2003) **[C-0132]**; Europe Agreement Establishing an Association Between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part, 16 December 1991, Art. 67 **[CLA-0003]**; *El Paso v. Argentina*, § 364 **[CLA-0025] / [RLA-0026]**; "Draft Articles on the Law of Treaties with commentaries", Yearbook of the International Law Commission, Volume II (1966) Art. 23(1) **[CLA-0130]**; United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations Treaty Series, Vol. 1155, 331, Art. 26 **[CLA-0140]**; Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part, signed on 16 December 1991 (Decision of the Council and the Commission of 13 December 1993, Official Journal of the EC No. L 347 Vol.36) Art. 72(1) **[CLA-0198]**; *Parkerings v. Lithuania*, § 333 **[RLA-0051]**; Legrand Statement, § 14 **[CWS-3]**.

726 C-II §§ 323 – 324; *El Paso v. Argentina*, §§ 358, 364 **[CLA-0025] / [RLA-0026]**.

727 C-II § 325; *El Paso v. Argentina*, § 402 **[CLA-0025] / [RLA-0026]**; *Saluka v. Czech Republic*, § 329 **[CLA-0049] / [RLA-0059]**; *Electrabel v. Hungary*, Decision on Jurisdiction, § 7.78 **[CLA-0070]**.

investment" is inseparable from the FET standard.[728] This is not a right to *stasis* – it accommodates the host State's right to exercise its legislative power, reasonably and proportionately.[729] In implementing changes to its legal framework, States must comply with fundamental principles such as good faith, due process and non-discrimination and must act in a way that is fair, consistent, and predictable.[730]

453. Although domestic laws are subject to change, investors are legitimately entitled to expect that a host State will provide a stable, predictable framework that meets certain baseline requirements.[731] Claimants had an expectation that Respondent would act in good faith and would not transform the voucher system or tax framework in a discriminatory and disproportionate manner that deliberately excluded Claimants' investment from the Hungarian voucher market. This expectation was based on Respondent's international obligations, and its obligations as a future or actual Member State of the EU.[732]

454. At the time of Claimants' investment, the voucher market was unregulated and all issuers were treated equally. By creating the voucher market and welcoming foreign investors, Respondent accepted certain basic obligations toward those investors – and the investors had the right to expect stability. Respondent could not adopt changes beyond certain acceptable margins. Claimants did not accept the risk of being treated arbitrarily or discriminatorily, and they did not

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[728] C-II § 326; *ADC v. Hungary*, § 423 **[CLA-0030] / [RLA-0004]**; *CMS Gas v. Argentina* Award, § 276 **[CLA-0036]**; *Parkerings v. Lithuania*, § 333 **[RLA-0051]**.

[729] C-II §§ 327 – 328, 333; *El Paso v. Argentina*, §§ 373, 400 **[CLA-0025] / [RLA-0026]**; *Ioan Micula v. Romania*, § 529 **[CLA-0061] / [RLA-0036]**; *Parkerings v. Lithuania*, § 332 **[RLA-0051]**.

[730] C-I § 346; *ADC v. Hungary*, § 424 **[CLA-0030] / [RLA-0004]**; *Saluka v. Czech Republic*, § 303 **[CLA-0049] / [RLA-0059]**; *Plama v. Bulgaria*, § 176 **[CLA-0063] / [RLA-0053]**; *Electrabel v. Hungary*, Decision on Jurisdiction, § 7.77 **[CLA-0070]**; *Yukos v. Russia*, § 1578 **[CLA-0071]**; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures (17 August 2007) [hereinafter "*Occidental v. Ecuador* Decision on Provisional Measures"], §§ 185, 191 **[CLA-0072]**.

[731] C-I §§ 344 – 345; C-II § 320 – 322; *Tecmed v. Mexico*, § 154 **[CLA-0022] / [RLA-0068]**; *El Paso v. Argentina*, §§ 358, 368 **[CLA-0025] / [RLA-0026]**; *ADC v. Hungary*, § 423 **[CLA-0030] / [RLA-0004]**; *CMS Gas v. Argentina* Award, § 276 **[CLA-0036]**; *LG&E v. Argentina* Decision on Liability, § 125 **[CLA-0041] / [RLA-0038]**; *Saluka v. Czech Republic*, §§ 301, 303, 307, 309 **[CLA-0049] / [RLA-0059]**; Rudolf Dolzer, "Fair and Equitable Treatment: Today's Contours", 12 Santa Clara J. INT'L K.7 (2014) 21, 28 – 29 **[CLA-0060]**; *Ioan Micula v. Romania*, § 528 **[CLA-0061] / [RLA-0036]**; Andrew Newcombe and Lluis Paradell, Law and Practice of Investment Treaties: Standards of Treatment, 1st Edition, Kluwer Law International, 2009, 280 **[CLA-0069]**; *Electrabel v. Hungary*, Decision on Jurisdiction, § 7.77 **[CLA-0070]**.

[732] C-II § 319; *El Paso v. Argentina*, § 364 **[CLA-0025] / [RLA-0026]**; *CMS Gas v. Argentina* Award, § 277 **[CLA-0036]**; *LG&E v. Argentina* Decision on Liability, § 125 **[CLA-0041] / [RLA-0038]**; *Saluka v. Czech Republic*, § 303 **[CLA-0049] / [RLA-0059]**; *Ioan Micula v. Romania*, § 528 **[CLA-0061] / [RLA-0036]**; *Parkerings v. Lithuania*, § 332 **[RLA-0051]**.

accept the risk of being deliberately targeted by the Hungarian legislature.[733] The 2011 Reform arbitrarily, discriminatorily, and confiscatorily altered the legal framework in which CD Hungary operated, rendering a once profitable enterprise inoperable.[734]

455. Whether Claimants had notice of the changes would not have removed the unreasonable and discriminatory nature of the 2011 Reform.[735]

(b) Respondent's Arguments

456. Claimants allege that Respondent violated the FET standard by breaking Claimants' legitimate expectation that Respondent would not violate the FET standard. This argument is circular and ultimately meaningless.[736]

457. While legitimate expectations have been associated with a more general right to predictability or transparency under a FET claim, this must be understood in light of the state authorities' right to regulate domestic affairs. Absent an express commitment or a stabilization clause, the doctrine of legitimate expectations cannot be invoked to protect the investor from all legislative or regulatory changes, especially those that are foreseeable. Changes in law are to be expected and all that an investor may expect is that the law be applied.[737]

458. Claimants suggest that "*stability and predictability*" is a universal legitimate expectation held by all investors. This argument must be rejected because it is based on a misunderstanding of arbitral jurisprudence. The tribunal in *Parkerings* did not endorse a broad or universal expectation of stability. In ultimately rejecting the claim in *Parkerings*, that tribunal found that the doctrine of

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733 C-I §§ 348 – 349, 351; Respondent press release, "Common Communication Campaign for the Success of the Szép Card" (16 December 2011) **[C-0079]**; Patrik Andó, "Hundreds of Millions for Promotion Purposes", Világgazsdaság (12 March 2012) **[C-0091]**; *El Paso v. Argentina*, § 402 **[CLA-0025]** / **[RLA-0026]**.

734 C-I § 352.

735 CPHB-I §§ 161 – 162; PIT Law **[C-0047]** (Hungary created a favorable environment for the fringe benefits system).

736 R-II § 271; C-II § 5.2.3.(A); Campbell McLachlan QC, Laurence Shore and Mathew Weiniger, International Investment Arbitration: Substantive Principles (Oxford University Press 2007) 234 **[RLA-0100]**.

737 RPHB-I §§ 74 – 75; *MTD v. Chile*, § 50 **[CLA-0050]**; *Total v. Argentina*, Decision on Liability, §§ 121 – 124 **[RLA-0070]**; Andrew Newcombe and Lluis Paradell, Law and Practice of Investment Treaties: Standards of Treatment, § 6 (Kluwer Law International BV 2009) **[RLA-0228]**; Oscar Chinn Case **[RLA-0166]**; *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A.) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award (8 July 2016) § 426 **[RLA-0265]**; *Blusun v. Italy*, §§ 367 – 371 **[RLA-0252]**; *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB (AF)/11/2, Award (4 April 2016) § 552 **[RLA-0257]**.

legitimate expectations, without more, cannot protect the investor from legislative or regulatory changes.[738] Many scholars and other authorities require that legitimate expectations are founded in specific State conduct.[739] Interpreting the FET clause as broadly as proposed by Claimants would run afoul two principles of international investment law: (1) it would unduly restrict the right of domestic authorities to regulate matters within their own borders, and (2) it would grant the investor insurance against any change in regulation, irrespective of whether they had negotiated for that right or protection.[740]

459. Even if the Tribunal were to find that there can be an expectation of stability or predictability in the absence of a particular commitment by the host State, such an expectation would need to "*rise to the level of legitimacy and reasonableness in light of the circumstances*."[741] Here, the non-specific circumstances like Hungary's entry into a BIT and the then-possible entry into the EU cannot give rise to meaningful expectations, and neither mention predictability or stability.[742] Further, there can be no reasonable expectation that Respondent would not change the regulations surrounding the fringe benefit system. Claimants have conceded that they were conscious of the possibility of reasonable changes in the legal framework – a framework that was altered after Claimants' initial investment and every year following.[743]

460. Although a measure will be found to violate the FET standard if it is contrary to a claimant's legitimate expectations, such an expectations must be "*justifiable and reasonable based on objective criteria*", because the investor received an explicit promise or guarantee as to (1) a particular legal or regulatory provision, (2) that the investor took into account in making its investment or (3) the circumstances surrounding the investment were such as to give rise to a

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[738] R-II §§ 264 – 266; C-II §§ 308, 314; *Parkerings v. Lithuania*, §§ 333, 336 **[RLA-0051]**; *Saluka v. Czech Republic*, § 304 **[CLA-0049]** / **[RLA-0059]**; *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award (12 October 2005) [hereinafter "*Noble Ventures v. Romania*"], § 181 **[RLA-0165]**.

[739] R-II § 267; *EDF v. Romania*, § 217 **[CLA-0221]**; *Glamis Gold v. USA*, § 620 **[RLA-0033]**; *Ioan Micula v. Romania*, §§ 528 – 529 **[CLA-0061]** / **[RLA-0036]**; *Saluka v. Czech Republic*, § 304 **[CLA-0049]** / **[RLA-0059]**; *Total v. Argentina*, Decision on Liability, § 117 **[RLA-0070]**; *ECE Projektmanagement International GmbH & Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co v. Czech Republic*, PCA Case No. 2010-5, Award (19 September 2013) § 4.762 **[RLA-0155]**; Andrew Newcombe and Lluis Paradell, Law and Practice of Investment Treaties: Standards of Treatment, § 6 (Kluwer Law International BV 2009) **[RLA-0228]**.

[740] R-II § 268; C-II § 327.

[741] R-II §§ 264, 269; *Saluka v. Czech Republic*, § 304 **[CLA-0049]** / **[RLA-0059]**; *Noble Ventures v. Romania*, § 181 **[RLA-0165]**.

[742] R-II § 270; *Continental Casualty v. Argentina*, § 261 **[RLA-0023]**.

[743] R-II § 272; C-I § 348; C-II § 333; Legrand Statement, § 14 **[CWS-3]**; *El Paso v. Argentina* **[CLA-0025]** / **[RLA-0026]**.

legitimate expectation.[744] It must also be shown that the claimant reasonably relied on the explicit or implicit promise from the host State.[745] This is a high standard, prohibiting a claimant from transforming wishful thinking into legitimate expectations.[746] Here, Claimants have pointed to no stabilization clause and no other basis for their alleged expectation. Thus, Respondent was permitted to regulate domestic matters, providing the measures are otherwise in accordance with the BIT.[747]

461. When Claimants entered the voucher market, they knew that their business was dependent on indirect subsidies provided by the State and that Claimants were, therefore, exposed to any changes in social policy. They invested with these risks in mind.[748] They were aware that laws would evolve and, as explained in *Saluka*, "[n]*o investor may reasonably expect that circumstances prevailing at the time the investment is made remain totally unchanged*."[749] Since Respondent did not commit otherwise, Respondent was permitted to regulate.[750] In the face of the 2008 financial crisis, Hungary was entitled to reassess the voucher system and to implement necessary changes. There could be no legitimate expectation that Hungary would not exercise this right.[751]

462. The doctrine of legitimate expectations does not create an "*entitlement to sufficient notice*."[752] Claimants here have not claimed an entitlement to notice, and here there are no circumstances that would suggest that Claimants had any expectation of notice or of a consultation right *vis-à-vis* changes of the State's annual tax policy.[753] Indeed, were a state to be required to give specific notice to all stake-holders or even just foreign investors, it would be impossible to pass an annual tax code. At best, the only expectation that Claimants held would be that the State would

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744 R-I §§ 238 – 239; *Parkerings v. Lithuania* **[RLA-0051]**; Andrew Newcombe and Lluís Paradell, Law and Practice of Investment Treaties: Standards of Treatment § 6.06 (Kluwer Law International BV 2009) **[RLA-0101]**.

745 R-I § 240; *Ioan Micula v. Romania* **[CLA-0061] / [RLA-0036]**.

746 R-I § 241; *GAMI v. Mexico* **[RLA-0031]**; *Marvin Feldman v. Mexico* [**CLA-0013] / [RLA-0041]**; *Metalpar v. Argentina*, § 186 **[RLA-0044]**; *Parkerings v. Lithuania* **[RLA-0051]**.

747 R-I §§ 242, 244.

748 *Id*., at § 243.

749 *Id*., at § 246; *Saluka v. Czech Republic*, § 305 **[CLA-0049] / [RLA-0059]**.

750 R-I § 245; *Continental Casualty v. Argentina*, § 258 **[RLA-0023]**.

751 R-I § 247; C-I §§ 343, 349; *Saluka v. Czech Republic* **[CLA-0049] / [RLA-0059]**.

752 RPHB-I § 85.

753 *Id*.

implement a draft law which would then be put into effect after a vote in Parliament and put into force according to law. This is exactly what happened in the present case and, thus, if there was any requirement of notice, it was satisfied.[754]

5. Tribunal Question (b)(b) Regarding the Relevance of EU Law *vis-à-vis* Article 3 of the BIT

463. The Tribunal's question (b)(b) was as follows:

> *b) The Relevance, if at all, of EU law to the Parties' respective positions on the application and interpretation of each of:* […] *(b) Article 3 of the France-Hungary BIT[.]*

(a) Claimants' Arguments

464. EU law as such has no relevance to the Parties' respective positions on the application and interpretation of Art. 3 of the BIT, and this is agreed between the Parties.[755] Claimants have only referred to the EU parallel infringement proceedings and the CJEU's judgment of 23 February 2016 because they constitute compelling factual evidence to Claimants' claim under Art. 3 of the BIT.[756] Claimants have relied on three facts established by the CJEU in its judgment in support of its claim that the 2011 Reform was unreasonable: (1) no other EU Member State has imposed comparable requirements on issuers of electronic vouchers, (2) the alleged objectives could have been achieved through less restrictive measures, and (3) a voucher card cannot be reflexively equated to a bank card.[757] These facts show that the 2011 Reform was unreasonable, as there was no rational justification for the 2011 Reform and there were less restrictive measures available to achieve the same alleged public purpose.[758]

(b) Respondent's Arguments

465. While the Parties agree that EU law has no relevance to the merits of this case,[759] the protections available under the France-Hungary BIT and EU law are not identical. With respect to Art. 3 of

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[754] *Id*.

[755] CPHB-I § 294; Tr. Day 4 at 86:9-11 (R. Closing).

[756] CPHB-I § 295.

[757] *Id*., at §§ 296 – 297.

[758] *Id*., at § 297.

[759] RPHB-I §§ 27 – 28; Tr. Day 4 at 5:2-15 (C. Closing).

the BIT, tribunals have held that the FET standard as articulated in international investment law has no parallel in EU law.[760]

466. While the TFEU and the FET standard contain a prohibition of discrimination on the basis of nationality, there are substantial and significant differences in the application of the non-discrimination standard in investment law and EU law. First, the two legal regimes tend to apply different comparator clauses to ascertain if two situations or objects are alike for the purpose of comparison. Respondent states that "*EU law has recently moved from the application of formal criteria – that refused to consider the competitive relationship between products – to endorsing economic considerations and even subjective elements in determining whether products or situations are similar. Investment law, [however], typically considers the competitive relationship between products to ascertain if products are alike.*"[761] Second, EU law limits the specific public policy grounds that may be invoked and requires that the disadvantage caused by the measure be "*necessary*" and "*proportionate*" to obtaining the public policy objective pursued.[762] In investment law, however, the treatment of investors must merely bear a "*reasonable*" relationship to the rational policies determined within the state's wide discretion.[763] Thus, while a particular measure may contravene both EU law and the BIT, a violation of EU law alone will not trigger a violation of the BIT, as Claimants agree.[764]

467. The CJEU Decision rendered on 23 February 2016 did not hold that the 2011 Reforms were expropriatory or that Hungary violated Art. 17 of the Charter. Rather, the CJEU determined that the 2011 Reforms violated the freedom of establishment and the freedom of movement of services.[765] That cause of action finds no parallel in the BIT or investment law generally, which provides protection for existing investments and compensates investors for damage that actually occurred.[766] Further, the factual findings have no relevance to the claims here. While the CJEU

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[760] RPHB-I § 31; *Achmea v. Slovakia* Award on Jurisdiction, § 250 **[RLA-0250]**.

[761] RPHB-I § 31; Nicolas F. Diebold, *Standards Of Non-Discrimination in International Economic Law*, *in* International & Comparative Law Quarterly (2011) **[RLA-0271]**.

[762] RPHB-I § 31; Angelos Dimopoulos, EU Foreign Investment Law (Oxford Univ. Press 2012) **[RLA-0272]**.

[763] RPHB-I § 31; *Saluka v. Czech Republic* **[CLA-0049]** / **[RLA-0059]**.

[764] RPHB-I § 32; C-II § 142 ("Claimants do not submit that the Respondent's breaches of EU law constitute, in themselves, a breach of the BIT").

[765] RPHB-I § 33; *EC v. Hungary*, CJEU Judgment, §§ 42, 64, 87, 107, 164 **[C-0153]** (the SZÉP Card and the Erzsébet voucher system operated by Hungary violated EU law).

[766] RPHB-I § 33; *Eastern Sugar v. Czech Republic*, §§ 160 – 164 **[RLA-0154]**; *Achmea v. Slovakia* Award on Jurisdiction, § 261 **[RLA-0250]**; *WNC v. Czech Republic*, § 303 **[RLA-0269]**.

found that certain aspects of the SZÉP Card framework violated the EU law principle of freedom of establishment, that freedom only protects the right of a company to choose the location of its incorporation within the EU without being subjected to differential treatment on that basis.[767] The SZÉP Card Decree contains an implicit requirement that, in order to qualify as an Issuer, a company must incorporate in Hungary and it stipulates the form of incorporation. These requirements were found by the CJEU to violate four separate provisions of Directive 123/2006/EC of the EU ("*Services Directive*").[768] Unlike the BIT, EU law requires that the State recognize incorporation in Hungary as equivalent to incorporation elsewhere in the EU.[769] While this criterion ran afoul of EU law, it is not the criterion that Claimants complain of because, factually, CD Hungary was incorporated in Hungary and, thus, this criterion could not have been the cause of Claimants' damage.[770]

468. Under Art. 3, Claimants must show not that there was differential treatment, but that this requirement was somehow unreasonable or not tied to a rational policy objective.[771] Respondent's requirement of local incorporation is typical and, in any event, this BIT and most others grant standing to investors where the investor has the nationality of the host State but is owned by investors in the other State. The requirement to submit to the jurisdiction makes sense for a business such as this one where issuers sell products that serve as a cash substitute and where employers and affiliates need confidence that an issuer would be able to satisfy ongoing obligations and that there would be redress before Hungarian courts. In this regard, Hungary is no different from most of the jurisdictions where Claimants operate in that local incorporation is a requirement of doing business.[772]

469. The CJEU Decision does not conclude that the SZÉP Card discriminates based on nationality.[773] All companies – whether foreign or domestic-owned – were required to satisfy the same criteria to become SZÉP Card Issuers. There is no prohibition on foreign ownership and all of the current Issuers are foreign-owned Hungarian subsidiaries (as were those that were considered while the

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767 RPHB-I § 34; *EC v. Hungary*, CJEU Judgment, §§ 42, 64, 87, 107 **[C-0153]**; Decree No. 55/2011, § 13 **[RLA-0091]**.

768 RPHB-I § 34; *EC v. Hungary*, CJEU Judgment **[C-0153]**.

769 RPHB-I § 35.

770 *Id*.

771 *Id*.

772 *Id*., at § 36.

773 *Id*., at § 37.

issuer criteria were being developed). There is no privilege whatsoever – the issue that the CJEU decided was a question of access to the market, not on whether the tax rates benefitted some over others (even assuming that the tax rates applied to issuers as opposed to fringe benefits, which they do not).[774] Finally, all private companies, whether foreign or domestic, where precluded from issuing the Erzsébet voucher because issuance was limited to the exclusive authority of the State, like analogous services such as health care, food stamps, etc. All such private companies were permitted to continue to issue other fringe benefits, including traditional paper vouchers for hot meals.[775]

6. Tribunal Question (j) Requesting Table Comparing Intentions and Action

470. The Tribunal's question (j) was as follows:

> *j) The Parties are requested to prepare a table comparing the Respondent's intention for reform as alleged by Claimants in their Opening Presentation (such as exhibits R-5, R-10, R-15, R-16, C-119, C-121, C-84) to the actual decisions of reform as issued and put in force by Respondent.*

471. The Parties presented numerous arguments in connection with their respective Tables, all of which have been helpful. Here, the Tribunal summarizes these arguments.

(a) Claimants' Arguments

472. The contemporaneous documents confirm that the 2011 Reform was intended to exclude CD Hungary and the other French Issuers – which together accounted for 86% of the Hungarian meal voucher market – and to replace them, such that their profits would not be earned by foreign companies and would instead remain in Hungary.[776]

473. Exhibits R-0010, R-0013, R-0015, and R-0016 demonstrate Respondent's intention that the SZÉP Card would replace hot meal vouchers issued by CD Hungary and other French issuers.[777]

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[774] *Id*., at §§ 37 – 38.

[775] *Id*., at § 39.

[776] CPHB-I § 34; First FTI Report, §§ 3.17, 3.19, 3.20 **[CEX-1]**.

[777] Memorandum for the Minister from Mr. Kristóf Szatmáry and Dr. Ádám Balog , Subject: The future of fringe benefits (31 May 2011) **[R-0010]**; Széchenyi Recreational Card – Project Status (9 September 2011) **[R-0013]**; Proposal for the Government on the reform of the system of fringe benefits (September 2011) **[R-0015]**; National Ministry of Economics, Proposal for the Government in Connection with the Amendment of Certain Tax Acts and Other Related Acts (11 October 2011) 9 **[R-0016]**.

Through the SZÉP Card Decree[778] and changes to the PIT Law, Claimants' hot meal vouchers were moved from the "*non-wage benefits*" category in Section 71 of the PIT[779] to Section 70's category of "*specifically defined benefits*."[780] The resulting tax differential made it impossible for CD Hungary to continue selling its vouchers, which offered the same service as the SZÉP Card and the Erzsébet voucher, but at a cost significantly higher to the clients.[781] The hot meal vouchers issued by CD Hungary and other French issuers were thus effectively replaced on the market by the SZÉP Card and the Erzsébet voucher.[782]

474. Claimants further state that Exhibits R-0010, R-0016, and Dr. Guller's First Witness Statement[783] show that Respondent intended that the Erzsébet voucher would replace the cold meal vouchers issued by CD Hungary and other existing issuers.[784] This change was implemented through changes to the PIT Law creating the Erszébet cold meal voucher[785] and the Decree on the Issuance of the Erzsébet Voucher, which gave the MNUA a monopoly over the issuance over the Erzsébet voucher.[786] The Erzsébet voucher's scope was also extended to cover hot meals, and this extension was made permanent in 2013.[787]

475. Exhibits C-0119, C-0120, and C-0121 demonstrate that Respondent's intention was that 100% of the profits made in the meal voucher market would remain in Hungary.[788] The 2011 Reform as implemented fulfilled this goal. First, CD Hungary and the other foreign-owned issuers could not

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778 Decree No. 55/2011 **[C-0073]**.

779 PIT Law as amended in 2010, effective 1 January 2011 6 **[C-0068]**.

780 2011 PIT Law at 5 **[RLA-0088] / [C-0074]**.

781 CPHB-I Annex No. 6, first Table.

782 CPHB-I Annex No. 6.

783 First Guller Statement, § 31 **[RWS-1]**. Memorandum for the Minister from Mr. Kristóf Szatmáry and Dr. Ádám Balog , Subject: The future of fringe benefits (31 May 2011) **[R-0010]**; National Ministry of Economics, Proposal for the Government in Connection with the Amendment of Certain Tax Acts and Other Related Acts (11 October 2011) 9 **[R-0016]**.

784 CPHB-I Annex No. 6.

785 PIT Law as amended in 2010, effective 1 January 2011 **[C-0068]**.

786 Decree No. 39/2011 (XII.29.) of the KIM on the issuance of the Erzsébet voucher (29 December 2011) **[C-0084]**, later Law CVX of 2013 on The amendment of certain acts on economic matters (21 June 2013) **[C-0086]**.

787 CPHB-I Annex No. 6; Decree No. 39/2011 (XII.29.) of the KIM on the issuance of the Erzsébet voucher (29 December 2011) **[C-0084]**.

788 Dr. Bence Rétvári (State Secretary of the KIM), Speech at the Parliament No. 152/90 (12 December 2011) **[C-0119]**; Mr. Miklós Soltész (Ministry of Natural Resources), Speech at the Parliament No. 152/161 (12 December 2011) **[C-0120]**; Mr. Miklós Soltész (Ministry of Natural Resources), Speech at the Parliament No. 152/165 (12 December 2011) **[C-0121]**.

make a profit because they were no longer competitive. Second, as for SZÉP Card Issuers, they are loss-making and, thus, have been unable to repatriate any profits. Finally, the profits generated by MNUA on the Erzsébet voucher remain in Hungary, as MNUA is a state-owned entity.[789]

476. Claimants agree that Exhibit R-0005, which Claimants state envisioned the creation of a card system by a 100% State-owned financial enterprise, did not become law.[790]

(b) Respondent's Arguments

477. Claimants' claim that they were deliberately targeted by reforms and that their removal from the market was the Government's motivation is inconsistent with the evidence.[791] Claimants are mistaken when they state that the proposed reforms discussed in Exhibits R-0005, R0010, R0015, and R-0016 were "*reflected entirely in the law which came into force on 1 January 2012*", as those are preparatory documents where the Government or other related individuals considered possible options for reform. Some of the options contained therein, including the complete elimination of the voucher system, were not implemented into law as part of the 2011 Reform or ever found their way into any legislation or act of the Hungarian Parliament.[792]

478. Second, Claimants have conflated products (fringe benefits) and the entities that facilitated the provision of those products to end-users (issuers, like CD Hungary), in an effort to manufacture ill-intent. Claimants are wrong to suggest that the Government's consideration of whether to eliminate a particular fringe benefit – the cold meal voucher – offers evidence of an intent to eliminate an issuer or set of issuers from the market. The Government elects to grant a tax benefit for a number of reasons that are particular to the fringe benefit in question. When priorities or budgets change, the Government might eliminate or add new fringe benefits because they were focused on the provision of services and/or goods, the end-users, and/or the impact on the economy. The Government was not focused on the potential market participants who might facilitate the use of the vouchers, which is at best a derivative business and not the focus of the system.[793]

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789 CPHB-I Annex No. 6.

790 CPHB-I Annex No. 6, n.5.

791 RPHB-I § 16.

792 *Id*., at § 96.

793 *Id*.

479. Exhibit R-0005 is only a partial translation of a document that highlights the main elements of the proposed SZÉP Card. While the Government considered limiting the issuance of the SZÉP Card to a State-owned enterprise, the Government also considered that the SZÉP Card might be issued/operated by tender-winning private entities, including CD Hungary.[794] Had the proposal been adopted, Claimants would have been prohibited from issuing the SZÉP Card, but not other fringe benefits. The proposal did not address the issuer criteria or suggest any intent to create overly restrictive criteria. The SZÉP Card Issuer criteria were designed to identify qualified issuers having a particular skillset that the Government viewed as relevant to the intended purpose, and these criteria applied equally to any party wishing to issue the SZÉP Card.[795] In developing the SZÉP Card criteria, the Government identified entities that were most likely to have the necessary infrastructure and would most likely be able and willing to agree to restricted commissions.[796] Claimants could have satisfied the issuer criteria and become a SZÉP Card Issuer by partnering with a bank, but chose not to.[797]

480. Exhibit R-0010 makes it clear that the Government was not focused on Claimants or even the so-called hot meal benefit, but rather on ensuring the efficient and effective delivery of fringe benefits to the Hungarian population. Under the 2011 PIT Law,[798] employers and employees could obtain the benefit of the hot meal either through a paper voucher and/or through the SZÉP Card. Under section 70(1)(a) of the 2011 PIT Law, hot and cold meal fringe benefits continued to receive a tax advantage and were neither eliminated by the reforms nor replaced by the SZÉP Card or the Erzsébet voucher. Due to the language of Exhibit R-0010, the SZÉP Cards would render the retention of the vacation voucher futile. At the time, that voucher was issued exclusively by the State. If the Government had intended to abolish the hot meal voucher and replace it with the SZÉP Card (a product), that does not mean that the Government intended to replace or exclude a particular issuer. The Government did not intend to exclude anyone or force anyone out.[799] The Government intended and assumed that issuers that were unable to qualify alone would partner with banks and issue the SZÉP Card and/or would continue to sell other

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794 RPHB-I Table 7, n.180; The main elements of the introduction of Széchenyi Recreational Card, prepared by: Rudolf Petendi, head counselor (24 September 2010) **[R-0005]**.

795 RPHB-I Table 7; Tr. Day 2 at 79:11 – 13 (Nagy) (*confirming*).

796 RPHB-I Table 7; Tr. Day 2 at 207:21 – 208:13 (Gans and Nagy).

797 RPHB-I Table 7; Tr. Day 2 at 79:7 – 10 (Gans and Nagy).

798 2011 PIT Law **[C-0074]** / **[RLA-0088]**.

799 RPHB-I Table 7; Tr. Day 2 at 135:9-15 (Szatmáry); *Id*. at 132:7 – 133:13 (*showing* that Claimants' counsel failed to afford the witness an opportunity to respond to Claimants' interpretation).

products.[800] There were sound reasons to expand the SZÉP Card to include catering and restaurant services, including to mitigate against initial distrust and, thus, to facilitate comfort with and adoption of the new benefit.[801] Finally, the State focused on all aspects of the Fringe Benefit System, and this supports the conclusion that the State was engaged in *bona fide* regulation and not in the improper targeting of Claimants or foreign nationals.[802]

481. Some of Claimants' allegations were based on a translation error of page 2 of Exhibit R-0015, which Respondent provided, and which should read "*this fringe benefit is the electronic card-based version of the previous hot meal voucher*."[803] Exhibit R-0015 shows that the Government considered a number of options for reform of the Fringe Benefit System, including abolishing paper-based hot meal vouchers. There was nothing, however, about being a "*current issuer*" that precluded an entity from also becoming a SZÉP Card Issuer. Exhibit R-0015 affirms the *bona fides* of the 2011 Reforms.

482. Regarding Exhibit R-0016, this proposal was ultimately not adopted as part of the 2011 Reforms. Neither the 2011 PIT Law nor any other law contains any limitation as to who can issue hot meal vouchers.[804] Moreover, that the Government considered abolishing hot meal vouchers does not mean that the Government intended to exclude or target any issuers. There is no basis for Claimants' interpretation that issuers were targeted. Exhibit R-0016 reaffirms the *bona fides* of the reform and the legitimate intentions of the Government.[805]

483. Regarding Exhibit C-0119, there is no possible argument that the State or any state sanctioned entity or even the SZÉP Card Issuers appropriated any profits from Claimants. Claimants had no right to future profits. Both MNUA and SZÉP Card Issuers had to generate their own customer bases and revenues. Due to the limits on commissions and the high infrastructure costs, the SZÉP Card Issuers are not making a profit but, rather, are losing money.[806]

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[800] RPHB-I Table 7; Tr. Day 2 at 139:16-24 (Szatmáry).

[801] RPHB-I Table 7; Tr. Day 2 at 47:23 – 48:24 (Nagy).

[802] RPHB-I Table 7.

[803] *Id*.; Tr. Day 2 at 143:19-25 – 144:6-22 (Szatmáry) (*explaining* that there was no replacement of issuers).

[804] RPHB-I Table 7.

[805] *See e.g.*, National Ministry of Economics, Proposal for the Government in Connection with the Amendment of Certain Tax Acts and Other Related Acts (11 October 2011) 4, 5 **[R-0016]**.

[806] RPHB-I Table 7, Tr. Day 3 at 80:8-12 (Nicholson).

484. Respondents also stated that, while the SZÉP Card and the Erzsébet voucher can be used to purchase the same end product, they offer more in terms of benefits to the population (like a less expensive product, due to restricted commissions). These products did not fully replace the hot meal and cold meal vouchers because those have been retained in the system.[807]

7. The Parties' Arguments in Response to the Tribunal's Question (d)

485. The Tribunal's question (d) was as follows:

> *d) Having regard to Hungary's membership of the European Union from 2004, whether, absent a sustained claim under Article 5 of the France-Hungary BIT, treatment consistent with Article 4 of the BIT is relevant to an evaluation of the just and equitable treatment claim under Article 3 of the BIT, save for any claim arising out of an alleged breach of EU law going to just and equitable treatment.*

(a) Claimants' Arguments

486. Article 3 of the BIT contains a specific prohibition of discrimination or unreasonable measures and a wider obligation to treat the investor's investment fairly and equitably.[808] Article 3 goes beyond national treatment and prohibits every type of discrimination with respect to the treatment of foreign investors.[809]

487. Article 3, however, does not include discrimination based on EU law, which – as was illustrated in the CJEU's judgment of 23 February 2016 – is subject to different criteria. Claimants have never advanced any allegation based on discrimination under EU law to prove their claim under Art. 3 of the BIT. Neither Art. 4 of the BIT nor EU law is relevant to the evaluation of the just and equitable treatment claim under Art. 3 of the BIT.[810]

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[807] Tr. Day 4 at 58:2-10 (R. Closing).

[808] CPHB-I §§ 117 – 122, 300 – 301; Tr. Day 4 at 97:21-25, 98:1-2 (R. Closing).

[809] CPHB-I §§ 125, 302 – 304; Andrew Newcombe and Lluis Paradell, Law and Practice of Investment Treaties: Standards of Treatment, 1st Edition, Kluwer Law International, 2009 §§ 6.27, 6.28 **[CLA-0055]**; Rudolf Dolzer, "Fair and Equitable Treatment: Today's Contour", 12 Santa Clara J. INT'L K.7 (2014), at 15 **[CLA-0060]**; *OAO Tatneft v. Ukraine*, PCA UNCITRAL, Award (29 July 2014) § 394 **[CLA-0250]**.

[810] CPHB-I §§ 305 – 307; *EC v. Hungary*, CJEU Judgment, §§ 8, 66 – 68, 85 – 92 **[C-0153]**.

(b) Respondent's Arguments

488. The fact that Hungary has been a Member State of the EU since 2004 should have no relevance for establishing any violation of any BIT provision. While circumstances that lead to a breach of EU law might result in a breach of the BIT, that would depend on the particular facts. The facts that led the CJEU to reach its conclusions in the CJEU Decision would not support a claim under Art. 3.[811]

489. Articles 4 and 3 of the BIT afford different protections and/or create different obligations for the host State. While Art. 4 requires the State to treat investors of other nations equal to domestic investors, Art. 3 requires that the State act fairly to investors.[812] The fact that the State treated similarly situated investors the same could be relevant to determining that there was no liability under Art. 3, as it could demonstrate that the State acted justly and fairly and undertook a general regulation that did not target a particular investor or group of investors.[813]

490. A showing that a party had not acted in accordance with Art. 4 would not necessarily suffice to establish a claim under Art. 3.[814] As various authorities have recognized, particularly in the area of fiscal policy, there may be sound reasons to differentiate between domestic and foreign taxpayers.[815] Accordingly, the fact that a challenged measure had the effect of distinguishing between local and foreign investors would violate the national treatment clause, but would not result in liability under Art. 3 of the BIT if that effect was incidental to a valid purpose and/or if that differentiation was supported by sound and justifiable policy reasons.[816] The underlying facts or conduct could result in liability under each of EU law, Art. 3, and/or Art. 4, but the assessment of whether facts give rise to a cause of action is unique to each cause of action and the particularities thereof.[817]

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811 RPHB-I § 43.

812 *Id*., at § 44; *Flemingo DutyFree Shop Private Limited v. Republic of Poland*, UNCITRAL, Award (12 August 2016) § 531 **[RLA-0261]**.

813 RPHB-I § 44.

814 *Id*., at § 45; *see, e.g.*, Tr. Day 2 at 60:13-16 (C. Opening).

815 RPHB-I § 45; The Oxford Handbook of International Investment Law (Peter Muchlinski et al. eds., 2008), at 339 **[RLA-0277]**.

816 RPHB-I § 45.

817 *Id*. at § 46.

8. Tribunal Considerations and Conclusions Regarding FET

491. Claimants' requests in this arbitration as quoted above are:

> - *Find that Hungary expropriated UP and C.D Holding Internationale of their investment in Hungary, in breach of Art. 5(2) of the BIT;*
> - *Find that Hungary (i) failed to accord UP and C.D Holding Internationale's investment in Hungary fair and equitable treatment and (ii) adopted unjustified and discriminatory measures that impeded the management, maintenance, use, enjoyment or liquidation of that investment, in breach of Art. 3 of the BIT;*
>
> *and consequently*
>
> - *Award compensation to UP and C.D Holding Internationale for their entire loss in the amount of €39,465,434 plus compound interest and net of any taxes, subject to adjustment until the date of payment;*
> - *Order Hungary to pay all costs, expenditures and fees in respect of the arbitration proceedings including legal fees incurred by UP and C.D Holding Internationale.*

492. Respondent's Request on the Merits is that the Tribunal dismiss all claims raised by Claimants.

493. The Tribunal notes that the Parties do not submit different requests as resulting from a possible breach of Art. 5(2) and of Art. 3 of the BIT. Above, the Tribunal has concluded that Respondent has breached Art. 5(2) and is, thus, liable. Therefore, if the Tribunal were to find that Respondent also breached Art. 3 of the BIT, it would not lead to any damages in excess of those which result from the breach of Art. 5(2). In the interest of procedural efficiency, therefore, the Tribunal considers that it need not examine whether Respondent also would be liable for a breach of Art. 3.

IX. NO FURTHER CLAIMS RAISED BY CLAIMANTS

494. As a precaution, the Tribunal asked the Parties to address the following issue:

> *c) The Relevance, if at all, of Article 4 of the France-Hungary BIT, and in particular its national treatment aspect, noting that the Claimants have not advanced an allegation of breach of Article 4.*

A. CLAIMANTS' ARGUMENTS

495. Claimants have not made a claim for breach of Art. 4 of the BIT, which obliges the host State to accord foreign investors "*the same treatment accorded to its own investors*."[818] To prove a breach of Art. 4, it would be necessary to prove that the 2011 Reform was discriminatory based on nationality. This contrasts with Art. 3 (FET).[819] Here, Claimants have proved that the 2011 Reform was discriminatory based on the differential treatment that Respondent imposed on them in comparable circumstances, without justification.[820]

B. RESPONDENT'S ARGUMENTS

496. Article 4 of the BIT has no relevance because Claimants have not alleged a breach of Art. 4, nor could they in light of the Signatories' limited consent to arbitration. Claimants' choice not to allege a violation of Art. 4, however, may have some relevance to the Tribunal's understanding of Claimants' claim and the defects thereof.[821] Article 4 requires that foreign investors be treated equally to domestic investors, while Art. 3 requires that they be treated fairly. In theory, there could be measures that apply equally to domestic and foreign nationals, but nonetheless violate Art. 3. Likewise, measures could comply with Art. 3, but run afoul Art. 4.[822] Here, the measures do not discriminate on the basis of nationality. Rather, any party that met the qualifications to become a SZÉP Card Issuer and agreed to the limitations thereon was entitled to issue the SZÉP Card, regardless of the nationality of the owners of the issuing company.[823] Even if Claimants were able to substantiate a claim of disparate treatment, this alone would not go far enough to substantiate a claim under the provision they have actually invoked – Art. 3.[824]

C. TRIBUNAL CONSIDERATIONS AND CONCLUSIONS

497. From the replies it is clear that Claimants have not submitted a claim regarding a breach of Art. 4.

[818] CPHB-I §§ 298 – 299; France-Hungary BIT, Art. 4 **[CLA-0001]** / **[RLA-0079]**.

[819] CPHB-I § 299; Agreement between the Republic of Croatia and the Republic of Hungary for the Promotion and Reciprocal Protection of Investments, signed 15 May 1996, in force as of 1 March 2002 **[CLA-0005]**.

[820] CPHB-I § 299.

[821] RPHB-I § 40; France-Hungary BIT, Art. 9(2) **[CLA-0001]** / **[RLA-0079]**.

[822] RPHB-I § 41; Ulf Linderfalk, On the Interpretation of Treaties (Springer 2007) **[RLA-0275]**.

[823] RPHB-I § 42.

[824] *Id*.

498. Thus, this Award only has to decide on the claims actually raised, *i.e.* whether there were breaches of Arts. 5(2) and 3.

X. DAMAGES

A. THE STANDARD OF COMPENSATION UNDER ART. 5(2) OF THE BIT

499. Regarding the standard of compensation, Art. 5(2) of the BIT states as follows:

> *[…]*
>
> *Any dispossession measures taken shall give rise to the payment of prompt and adequate compensation, the amount of which must equal the real value of the investments concerned on the day prior to the date on which the measures are taken or made public.*
>
> *Such compensation shall be payable to investors in convertible funds, and shall be freely transferrable. It shall be paid promptly starting from the date of the dispossession, failing which, interest calculated at the applicable market rate shall be charged up to the date of payment.*[825]

1. Claimants' Arguments

500. Compensation for the unlawful expropriation of CD Hungary is governed by customary international law, rather than Art. 5(2) of the BIT.[826] To compensate Claimants for losses resulting from Respondent's violations of the BIT, damages must be calculated in accordance with the principle of full reparation, which aims to put Claimants in the position they would have been in, had Respondent not breached its obligations under the BIT.[827] Unlike the standard of compensation set forth in Art. 5(2), the customary international law standard allows the Tribunal to (1) consider events after the Valuation Date when quantifying Claimants' loss, and (2) assess both the value of the enterprise and the consequential damages flowing from Respondent's

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[825] France-Hungary BIT, Art. 5(2) **[CLA-0001]** / **[RLA-0079]**.

[826] C-II § 346.

[827] *Id*., at § 34; C-I § 353; *Chorzów Factory (Claim for Indemnity) (Merits), Germany v. Poland*, 1928 P.C.I.J. Ser. A., No. 17, Judgment No. 13, Award (13 September 1928) **[CLA-0079]**; "Responsibility of States for Internationally Wrongful Acts", 53 UN GAOR Supp. (No. 10) at 43, UN Doc. A/56/83 (2001) Art. 31 **[CLA-0080]**.

breaches.[828] In its post-hearing submission, Claimants highlighted that the consequential damages claimed by Claimants are the losses associated with Výroba, Claimants' subsidiary.[829]

501. Although Respondent accepts that a distinction between lawful and unlawful expropriation is "*both necessary and logical*",[830] it argues that the compensation rules of Art. 5(2) should apply to both lawful and unlawful expropriation, thereby limiting Claimants' damages to the "*actual value*" of their investment. Article 5(2), however, contains an express carve-out and is therefore only *lex specialis* for lawful expropriation. Further, as confirmed in investment jurisprudence, including *ADC v. Hungary*, unless a treaty contains a clear reference to damages due for unlawful expropriation, the compensation rule referred to in the BIT will only apply to lawful expropriation, with damages for unlawful expropriation being governed by customary international law. The compensation rule prescribed in Art. 5(2) of the BIT, therefore, does not apply to unlawful expropriation.[831]

502. The customary international law principle of full reparation was defined in the oft-cited PCIJ *Chorzow Factory* case and this principle has since been codified in Art. 31 of the ILC Articles on State Responsibility. While restitution in kind would most closely conform to the principle of full reparation, such is frequently neither possible nor practical. Here, it would be impossible to restore the *status quo ante* and any attempt to do so would require significant interference with Respondent's sovereignty. The appropriate remedy should therefore be the payment of a sum corresponding to the value that restitution in kind would bear, as defined by Art. 36 of the ILC Articles.[832]

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[828] C-I § 369; "Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries", Yearbook of the International Law Commission, 2 vol. II, Part Two (2001) § 34 **[CLA-0081]**; Andrew Newcombe and Lluis Paradell, Law and Practice of Investment Treaties: Standards of Treatment, 1st Edition, Kluwer Law International, 2009, 395 **[CLA-0085]**; Mark Kantor, Valuation for Arbitration: Compensation Standards Valuation Methods and Expert Evidence, Kluwer Law, 2008, 65 **[CLA-0086]**; Irmgard Marboe, "Compensation and Damages in International Law The Limits of 'Fair Market Value'", Transnational Dispute Management Vol. 4, Issue 6 (November 2007) 751 **[CLA-0087]**.

[829] CPHB-I § 173 – 174; First Navigant Report, §§ 243 – 246 **[REX-1]**.

[830] C-I §§ 361 – 363; C-II § 348; R-I §§ 253 – 256.

[831] C-I § 356; C-II §§ 347 – 356; CPHB-I §§ 168 – 172; France-Hungary BIT, Art. 5(2) **[CLA-0001]** / **[RLA-0079]**; *ADC v. Hungary*, § 481 **[CLA-0030]** / **[RLA-0004]**; Sébastien Manciaux, *Investissements Etrangers et arbitrage entre Etats et ressortissants d'autres Etats – Trente années d'activité du CIRDI*, Litec, 2004, § 674 **[CLA-0222]**; Arnaud De Nanteuil, *L'expropriation indirecte en droit international de l'investissement*, Editions A. Pedone, 2014, 186 **[CLA-0223]**.

[832] C-I §§ 365 – 367; *Yukos v. Russia*, §§ 1587 – 1593 **[CLA-0071]**; *Occidental v. Ecuador* Decision on Provisional Measures, §§ 81 – 84 **[CLA-0072]**; *Chorzów Factory (Claim for Indemnity) (Merits), Germany v. Poland*, 1928 P.C.I.J. Ser. A., No. 17, Judgment No. 13, Award (13 September 1928) 47 **[CLA-0079]**; "Responsibility of States for Internationally Wrongful Acts", 53 UN GAOR Supp. (No. 10) at 43, UN Doc.

503. Respondent introduces an artificial distinction between the first and second paragraphs of Art. 5(2) of the BIT to argue that paragraph 2 applies to "*any dispossession*", regardless of legality.[833] This suffers from three flaws. First, it fails to interpret Art. 5(2) in its context and in light of the BIT's object and purpose, as required by the VCLT.[834] Second, it relies on a mistaken distinction between the present case and *Vivendi*. Contrary to Respondent's assertion, that tribunal found that the France-Argentina BIT did not purport to establish *lex specialis* governing the standards of compensation for wrongful expropriations.[835] Third, the submission is founded upon an erroneous translation of the text "*measures de dispossession qui pourraient être prises*", which in the authoritative French and Hungarian does not allow for "*any*" measure (as argued by Respondent, based on the non-authoritative English translation), but rather restricts the compensation calculation method in Art. 5(2) to permissible or lawful expropriation. Thus, the interpretation of the relevant wording in other French BITs supports Claimants' position that it only applies to lawful expropriation measures.[836]

A/56/83 (2001) Art. 31 **[CLA-0080]**; "Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries", Yearbook of the International Law Commission, 2 vol. II, Part Two (2001) § 4 **[CLA-0081]**; Alan Redfern and Martin Hunter, Law and Practice of International Commercial Arbitration, 3rd Edition, Sweet & Maxwell, 1999, 372 **[CLA-0082]**; Thomas W. Wälde, "Remedies and Compensation in International Investment Law", Transnational Dispute Management, Vol. 2, Issue 5 (November 2005) 21 **[CLA-0083]**; Sergey Ripinsky and Kevin Williams, Damages in International Investment Law, BIICL, 2008, 57 – 59 **[CLA-0084]**.

833 C-I §§ 357 – 361; *ADC v. Hungary*, § 497 **[CLA-0030] / [RLA-0004]**; Andrew Newcombe and Lluis Paradell, Law and Practice of Investment Treaties: Standards of Treatment, 1st Edition, Kluwer Law International, 2009, 382 **[CLA-0073]**; Sergey Ripinsky and Kevin Williams, Damages in International Investment Law, BIICL, 2008, 67 **[CLA-0074]**; Pierre Bienvenu and Martin J. Valasek, "Compensation for Unlawful Expropriation, and Other Recent Manifestations of the Principle of Full Reparation" in International Investment Law in Albert Jan van den Berg (ed.), 50 Years of the New York Convention: ICCA International Arbitration Conference, ICCA Congress Series, 2009, Dublin, Volume 14 240 – 244 **[CLA-0075]**.

834 C-II § 362; United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations Treaty Series, vol. 1155, 331, Art. 31 **[CLA-0052]**.

835 C-II §§ 363 – 364; R-I § 255 n. 269; *Vivendi v. Argentina*, § 8.2.3 **[CLA-0021] / [RLA-0021]**.

836 C-I §§ 357 – 364; C-II 365 – 370; France-Hungary BIT, Art. 5(2) **[CLA-0001] / [RLA-0079]**; *Vivendi v. Argentina*, § 8.2.8 **[CLA-0021] / [RLA-0021]**; *ADC v. Hungary*, § 497 **[CLA-0030] / [RLA-0004]**; United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations Treaty Series, vol. 1155, 331, Art. 31 **[CLA-0052]**; Andrew Newcombe and Lluis Paradell, Law and Practice of Investment Treaties: Standards of Treatment, 1st Edition, Kluwer Law International, 2009, 382 **[CLA-0073]**; Sergey Ripinsky and Kevin Williams, Damages in International Investment Law, BIICL, 2008, 67 **[CLA-0074]**; Pierre Bienvenu and Martin J. Valasek, "Compensation for Unlawful Expropriation, and Other Recent Manifestations of the Principle of Full Reparation" in International Investment Law in Albert Jan van den Berg (ed.), 50 Years of the New York Convention: ICCA International Arbitration Conference, ICCA Congress Series, 2009, Dublin, Volume 14 240 – 244 **[CLA-0075]**; Charles Brower and Michael Ottolenghi, "Damages in Investor-State Arbitration", Transnational Dispute Management, Vol. 4, Issue 6 (2007) 13 **[CLA-0076]**; Ian Brownlie, Principles of Public International Law, 7th Edition, Oxford University Press, 2008, 539 **[CLA-0077]**; Campbell McLachlan, Laurence Shore, and Matthew Weiniger, International Investment Arbitration Substantive Principles, 1st Edition, Oxford University Press, 2007, § 9.107 **[CLA-0078]**; Agreement between

504. In the alternative, should the Tribunal apply the methodology for calculating damages set out in paragraph 2 of Art. 5(2) of the BIT, Claimants note that (1) the calculation of the "*real value*" of an investment under Art. 5(2) of the BIT should be read as a reference to "*fair market value*" and (2) the DCF methodology is the most accurate method of assessing fair market value of this investment.[837]

2. Respondent's Arguments

505. Article 5(2) of the BIT specifies that Claimants can only be entitled to the actual value of their investment as damages – nothing more. Although international law recognizes a right to "*full reparation*" for an international wrong, Claimants must prove the existence of damage as well as a causal link between the breaches of the BIT and the damage alleged. Full reparation does not permit the recovery of damages that have not been suffered or that are too remote. Rather, reparation should put the claimant in the same – but no better – position that it would have occupied in absent the breach.[838] Exemplary or punitive damages that are too attenuated from the breach or which could have been mitigated should be excluded from the obligation to make full reparation.[839]

506. The French and Hungarian language versions of Art. 5(2) do not use the term "*any*", but nonetheless employ generic pronouns, indicating that the term "*dispossession measures*" refers to any of a large number, class, or category of dispossession measures. The first paragraph of Art. 5(2) sets the compensation standard that "*shall*" apply to all types of measures contemplated therein and it stands to reason that that remains unchanged in the second paragraph. The entirety of Art. 5(2) sets forth the conditions for lawful and unlawful dispossessions. Logically, it does

the Government of the Federal Republic of Ethiopia and the Government of the Republic of France for the reciprocal promotion and protection of investments, signed 25 June 2003 (Effective 7 August 2004) Art. 5(2) **[CLA-0203]**; Agreement between the Government of Jamaica and the Government of the Republic of France on the reciprocal promotion and protection of investments, signed 25 January 1993 (Effective 15 September 1994) Art. 5(3) **[CLA-0206]**; Agreement between the Government of the Republic of Trinidad and Tobago and the Government of the Republic of France on the reciprocal promotion and protection of investments, signed 28 October 1993 (Effective 16 May 1996) Art. 5(2) **[CLA-0224]**; Agreement between the Government of the Republic of India and the Government of the Republic of France on the reciprocal promotion and protection of investments, signed 2 September 1997 (Effective 17 May 2000) Art. 6(2) **[CLA-0225]**.

[837] C-II § 393; Sergey Ripinsky and Kevin Williams, Damages in International Investment Law, BIICL, 2008, 182-183 **[CLA-0231]**; *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Final Award (14 March 2003) § 493 **[CLA-0232]**; *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award (29 July 2008), § 786 **[CLA-0233]**.

[838] R-II §§ 287 – 291.

[839] *Id*., at § 292.

not permit an additional standard of compensation. It, therefore, constitutes *lex specialis* that governs any compensation that may be awarded to Claimants and limits the quantum of any award to the real value of the investment in Hungary.[840]

507. Claimants are incorrect when they argue that Art. 5(2) only applies to lawful expropriations. They reach this conclusion by an impermissible reading of Art. 5(2) that interprets the phrase "*could be taken*" or "*might be taken*" as referring only to lawful takings under the BIT. The phrase, however, makes no such distinction. It refers to measures that factually have the capacity of being adopted. Claimants' interpretation is contrary to the plain and ordinary meaning of the word "*could*" and leads to a misinterpretation of the BIT.[841]

508. The claim that paragraph two specifies a condition for lawful expropriation does not follow from the text.[842] Claimants' argument also fails to acknowledge the third paragraph of Art. 5(2), which details the compensation contemplated in the second paragraph and is critical to understanding the object and purpose of the article. The third paragraph details the compensation in the second paragraph, including that "*it shall be paid promptly from the date of dispossession, failing which, interest calculated at the applicable market rate shall be charged up to the date of payment.*" Thus, on Claimants' reading of Art. 5(2) (that a failure to provide prompt payment converts a lawful expropriation into an unlawful one), Respondent explains that "*Art. 5(2) must set the calculation method for compensation for both lawful <u>and</u> unlawful compensation, including providing that where an expropriation is unlawful due to a failure to provide prompt compensation, interest must be paid.*"[843]

509. Further, the same word must be given the same meaning in the same document. The term "*dispossession measures*" as found in Art. 9(2) and Art. 5(2) gives the Tribunal jurisdiction over all disputes concerning lawful and unlawful dispossessions, as well as the compensation that

[840] R-I §§ 253 – 255; R-II §§ 275 – 277; *Tidewater Investment SRL, Tidewater Caribe, C.A., v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Award (13 March 2015) [hereinafter "*Tidewater v. Venezuela*"], § 136 **[CLA-0236]**; *Vivendi v. Argentina*, § 7.5.1 **[CLA-0021]** / **[RLA-0021]**; France-Hungary BIT, Art. 5(2) **[CLA-0001]** / **[RLA-0079]**; Yas Banifatemi and Andre Von Walker, *France*, *in* Commentaries on Selected Investment Treaties (Chester Brown ed., 2013) 266 **[RLA-0207]**; UNCTAD, *Expropriation* (2012)"] **[RLA-0239]**.

[841] R-I § 256; R-II § 278; C-I § 359; C-II § 362.

[842] R-II §§ 278 – 280; C-II § 359, 362, 368; France-Hungary BIT, Art. 5(2) **[CLA-0001]** / **[RLA-0079]**.

[843] R-II § 281 (emphasis in original); C-II §§ 173, 354; France-Hungary BIT, Art. 5(2) **[CLA-0001]** / **[RLA-0079]**.

would flow from such disputes. In respect of compensation, therefore, the term should be interpreted as concerning lawful and unlawful dispossessions.[844]

510. Each treaty must be interpreted and applied as written, and *ADC v. Hungary* does not stand for the proposition that there is a general rule of construction that would presume that the compensation rule referred to in all BITs will apply only to lawful expropriations unless they explicitly state that they also apply to unlawful expropriations.[845] In *British Caribbean Bank Ltd. v. Belize*, the tribunal rejected the approach that Claimants advocate here and instead found that the standard of compensation set forth in the BIT provided the standard for breach thereof.[846] Likewise, Claimants' argument based on *Vivendi* is flawed, as the underlying treaty in that case delineated the standard only for lawful compensation.[847] It is, therefore, inapplicable here.

3. Tribunal Considerations and Conclusions

511. The Tribunal does not agree with Respondent's view that, while accepting a distinction between lawful and unlawful expropriation, it is "*both necessary and logical*"[848] that the compensation rules of Art. 5(2) should apply to both lawful and unlawful expropriation. It is by no means "*logical*" that a breach of Art. 5(2) by an unlawful dispossession should not result in any wider liability than a lawful dispossession. Most legal systems, though by different terminology and criteria, distinguish between a "*compensation*" for lawful measures and a liability for "*damages*" as a result for unlawful measures. As Claimants correctly argue, Art. 5(2) contains an express *lex specialis* for lawful expropriation. Indeed, as confirmed in investment jurisprudence, including *ADC v. Hungary*, unless a treaty contains a clear reference to damages due for unlawful expropriation, the compensation rule referred to in the BIT will only apply to lawful expropriation, with damages for unlawful expropriation being governed by customary international law. The compensation rule prescribed in Art. 5(2) of the BIT, therefore, does not apply to unlawful expropriation.[849]

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844 R-II § 282; C-II § 173; France-Hungary BIT, Art. 9(2) **[CLA-0001]** / **[RLA-0079]**.

845 R-II § 283; C-II § 356; *ADC v. Hungary*, **[CLA-0030]** / **[RLA-0004]**.

846 R-II § 284; *British Caribbean Bank Ltd. v. Government of Belize*, UNCITRAL, PCA Case No. 2010-18, Award (19 December 2014) [hereinafter "*BCB v. Belize*"] **[RLA-0148]**.

847 R-II § 285; C-II §§ 180 – 182, 364; *Vivendi v. Argentina* **[CLA-0021]** / **[RLA-0021]**.

848 C-I §§ 361 – 363; C-II § 348; R-I §§ 253 – 256.

849 C-I § 356; C-II §§ 347 – 356; CPHB-I §§ 168 – 172; France-Hungary BIT, Art. 5(2) **[CLA-0001]** / **[RLA-0079]**; *ADC v. Hungary*, § 481 **[CLA-0030]** / **[RLA-0004]**; Sébastien Manciaux, *Investissements Etrangers et arbitrage entre Etats et ressortissants d'autres Etats – Trente années d'activité du CIRDI*, Litec, 2004, § 674

512. Rather, the customary international law principle of full reparation was defined in the oft-cited PCIJ *Chorzow Factory* case, and this principle has since been reflected in Art. 31 of the ILC Articles. Under this standard, compensation must wipe out the consequences of the illegal act.[850] Thus, the customary international law principle of full reparation includes reparation for consequential damages.

B. The Standard of Compensation For Violation of Art. 3 of the BIT

1. Claimants' Arguments

513. For a breach of Art. 3 of the BIT, the compensation awarded to Claimants should be determined in accordance with customary international law.[851] The principle of full reparation as articulated by the PCIJ in *Chorzow Factory* and reflected in Art. 31 of the ILC Articles applies to claims under Art. 3 of the BIT.[852]

514. Respondent's breach of its FET obligation has caused Claimants to be deprived of the economic value of their investment. As a result, Claimants are entitled to the same damages as would be due in the case of an unlawful expropriation.[853] This principle has been adopted by academics,[854] and has been illustrated in cases.[855]

[CLA-0222]; Arnaud De Nanteuil, *L'expropriation indirecte en droit international de l'investissement*, Editions A. Pedone, 2014, 186 **[CLA-0223]**.

[850] *See* discussion Meg Kinnear, "Damages in Investment Treaty Arbitration", in Katia Yannaca-Small (ed.), Arbitration under International Investment Agreement, a Guide to the Key Issues, Oxford University Press, 2010, 559 **[CLA-0089]**; *Siemens v. Argentina*, §§ 352 – 353 **[CLA-0028] / [RLA-0063]**.

[851] C-II §§ 376 – 378; *Chorzów Factory (Claim for Indemnity) (Merits), Germany v. Poland*, 1928 P.C.I.J. Ser. A., No. 17, Judgment No. 13, Award (13 September 1928) **[CLA-0079]**; "Responsibility of States for Internationally Wrongful Acts", 53 UN GAOR Supp. (No. 10) at 43, UN Doc. A/56/83 (2001) Art. 31 **[CLA-0080]**.

[852] C-II § 373.

[853] C-II §§ 379, 382.

[854] *Id*., at § 380; Campbell McLachlan, Laurence Shore, and Matthew Weiniger, *International Investment Arbitration Substantive Principles*, 1st Edition, Oxford University Press, 2007, §§ 9.107 – 9.019 **[CLA-0078]**; Christopher F. Dugan, Don Wallace Jr., Noah Rubins and Borzu Sabahi, Investor-State Arbitration, Oxford University Press, 2008, 579 **[CLA-0228]**.

[855] C-II § 381; *CMS Gas v. Argentina* Award, § 410 **[CLA-0036]**; *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic*, ICSID Case No. ARB/02/1, Award (25 July 2007) [hereinafter "*LG&E v. Argentina* Award"] **[CLA-0229]** / **[RLA-0138]**.

515. The cumulative breaches of Art. 5(2) and 3 of the BIT give rise to full compensation.[856] A tribunal confronted with multiple heads of loss including expropriation typically bases its award on the measure of damages due in respect of expropriation because expropriation typically gives rise to the highest level of reparation and, as a consequence, other treaty breaches would not cause additional losses.[857] Here, Respondent's violations of the BIT, individually and cumulatively, have led to the destruction of Claimants' investment and full reparation must be awarded in respect of all of Claimants' losses.[858]

2. Respondent's Arguments

516. Respondent has not acquiesced to Claimants' proposed standard of compensation for claims under Art. 3 of the BIT. The BIT does not define the manner in which damages are to be calculated for treaty violations other than expropriation. In similar situations, relying on principles of international law, most tribunals have held that the appropriate standard of damages for these types of breaches is the loss "*adequately connected to the breach*" of that specific provision of the treaty.[859]

517. Where expropriation and non-expropriatory breaches produce the same effects, it may be appropriate to measure the loss, and therefore compensation, by focusing on the market value of the investment loss. It would not be proper to make such an award where doing so would compensate Claimants beyond the actual harm.[860] Thus, the appropriate focus is on the nature and extent of the loss caused by the conduct in question. Accordingly, if Claimants fail to show that they were substantially deprived of their investment to support an expropriation claim, they will be no more able to recover that loss under Art. 3 than under Art. 5(2).[861]

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[856] C-II § 372.

[857] *Id.*, at § 374; *Vivendi v. Argentina*, §§ 8.2.8, 8.2.10 **[CLA-0021] / [RLA-0021]**; *Tecmed v. Mexico*, § 188 **[CLA-0022] / [RLA-0068]**; *CME v. Czech Republic* Partial Award, § 618 **[CLA-0023]**; Mark Kantor, Compensation Standards Valuation Methods and Expert Evidence, Ch. 2 (2008), 89 **[CLA-0226]**; Christopher F. Dugan, Don Wallace Jr., Noah Rubins and Borzu Sabahi, Investor-State Arbitration, Oxford University Press, 2008, 579 **[CLA-0228]**.

[858] CPHB-I §§ 176 – 178.

[859] R-II § 294 – 296; C-II § 371; *S.D. Myers v. Canada* Partial Award, § 309 **[CLA -0027]**; *Marvin Feldman v. Mexico*, §§ 194 – 197 **[CLA-0013] / [RLA-0041]**; *S.D. Myers, Inc. v. Government of Canada*, NAFTA, Second Partial Award (21 October 2002) § 140 **[RLA-0174]**.

[860] R-II § 297; *Marvin Feldman v. Mexico*, § 194 **[CLA-0013] / [RLA-0041]**.

[861] R-II §§ 298 – 299; *LG&E v. Argentina* Award, § 45 **[CLA-0229] / [RLA-0138]**.

3. Tribunal Considerations and Conclusions

518. As the Tribunal has concluded above that it does not need to examine whether, in addition to the breach found above regarding Art. 5(2) of the BIT, there is also no need to examine that standard for compensation for a possible breach of Art. 3.

C. ARGUMENTS RELATED TO THE PARTIES' AND EXPERTS' DAMAGES CALCULATIONS

519. The Parties also agree that, in case the Tribunal finds a breach of the BIT and does not apply the compensation standard of Art. 5(2) for lawful measures, damages may be assessed using a **DCF method**,[862] though they disagree how it should be applied in the present case.[863]

1. Claimants' Arguments

520. In their post-hearing submission, Claimants updated their losses to total **EUR 27.4 million** before interest (as opposed to EUR 26,909,000 before interest).[864] Claimants reported that the loss in value of CD Hungary was **updated to EUR 23.6** (as opposed to EUR 23.2 million in the Second FTI Report) and the value of Výroba's lost profits amount to EUR 3.8 million (as opposed to EUR 3.7 million).[865] Claimants seek to recover for the loss of the value of the expropriated enterprise and the value of their subsidiary, Výroba, from which CD Hungary procured its vouchers.[866] The Second FTI Report adjusted the discount rate related to CD Hungary from 12.6% to 12.8%.[867] The discount rate used to assess the lost profits of Výroba was adjusted in the Second FTI Report from 10.5% to 11.7%.[868]

521. FTI confirms the reliability of its DCF valuation by comparing it to the results obtained by using other methodologies: the market value of other publicly-listed comparable companies and past

[862] In the DCF assessment, the business's year-on-year future cash flow (revenue less expenses) is projected from the Valuation Date, onward. A discount rate is then applied to the projected net cash flow to calculate the present value of those cash flows.

[863] CPHB-I § 163; Navigant's Opening Slide 4; Tr. Day 3 at 127:18-22 (Navigant); R-I § 251.

[864] CPHB-I § 279; C-II § 420.

[865] CPHB-I § 279; C-II §§ 429 (*reporting* the value of CD Hungary as EUR 23.2 million) and 432 (*reporting* Výroba's lost profits as EUR 3.7 million).

[866] C-I § 371.

[867] C-II § 427; Second FTI Report, Appendix 3 para A3.43, A3.12-3.16 - 3.21**[CEX-2]**.

[868] C-II § 430.

transactions involving companies comparable to CD Hungary. FTI's DCF valuation is well within range values derived from these benchmarks.[869]

522. The DCF methodology is most appropriate for assessing Claimants' losses because it best reflects the value of an enterprise that is well-established and has been operating for a sufficient period of time to allow for a meaningful projection of future profits.[870] Claimants have demonstrated that CD Hungary was a successful and profitable operation. The conclusion that there would have been future profits is well-founded, satisfying the test for the award of future lost profits.[871] Although some tribunals have been reluctant to apply the DCF valuation methodology, this is of no relevance to the present case. Unlike the claimants and/or investments in *Siemens AG v. Argentina*, *Wena Hotels v. Egypt*, *Metalclad v. Mexico*, and *Siag v. Egypt*, CD Hungary had a long operational history and had been reliably profitable since 2004.[872] Indeed, on the Valuation Date, CD Hungary had been operational for over 15 years and had just completed its 8th year of profitability, which is sufficient for deriving reliable cash flow projects for a future 5-year period. Unlike in the *Tecmed* and *SPP v. Egypt* cases, applying the DCF methodology in such a situation cannot be described as "*speculative*."[873]

523. In calculating CD Hungary's future revenues for 2012 – 2016, FTI projected CD Hungary's future issuance volume based on (1) CD Hungary's past performance (issue volume and market share)

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[869] C-I §§ 393 – 394; First FTI Report, §§ 5.1, 5.10 – 5.24 **[CEX-1]**.

[870] C-I §§ 374 – 376, 385; C-II § 384; *Biwater v. Tanzania*, § 793 **[CLA-0017]** / **[RLA-0016]**; Sergey Ripinsky and Kevin Williams, Damages in International Investment Law, BIICL, 2008, 195 **[CLA-0088]**; Meg Kinnear, "Damages in Investment Treaty Arbitration", in Katia Yannaca-Small (ed.), Arbitration under International Investment Agreement, a Guide to the Key Issues, Oxford University Press, 2010 563 **[CLA-0089]**; Campbell McLachlan, Laurence Shore, and Matthew Weiniger, International Investment Arbitration Substantive Principles, 1st Edition, Oxford University Press, 2007, § 9.73 **[CLA-0090]**.

[871] C-I § 377 – 378; C-II §§ 386 – 388; R-I §§ 257 *et seq.*; *Metalclad v. Mexico*, §§ 120, 121 **[CLA-0016]** / **[RLA-0043]**; "Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries", Yearbook of the International Law Commission, 2 vol. II, Part Two (2001) 104 **[CLA-0081]**; Sergey Ripinsky and Kevin Williams, Damages in International Investment Law, BIICL, 2008, 206 **[CLA-0091]**; First FTI Report, §§ 3.59, 3.74 **[CEX-1]**; First report on State responsibility by Mr. Roberto Ago, Special Rapporteur – Review of previous work on codification of the topic of the international responsibility of States (Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens), Yearbook of the International Law Commission (Extract)(1969, vol. II) **[RLA-0099]**.

[872] C-II § 389 – 390; *Metalclad v. Mexico*, §§ 120, 121 **[CLA-0016] / [RLA-0043]**; *Siemens v. Argentina*, §§ 357, 379 **[CLA-0028]** / **[RLA-0063]**; *Siag v. Egypt*, § 570 **[CLA-0040]**; *Wena Hotels Limited v. Arab Republic of Egypt,* ICSID Case No. ARB/98/4, Award (8 December 2000) [hereinafter "*Wena v. Egypt*"], § 124 **[RLA-0077]**; First FTI Report, Figure 3-5 **[CEX-1]**.

[873] C-II §§ 391 – 392; R-I § 274; *Tecmed v. Mexico*, § 186 **[CLA-0022] / [RLA-0068]**; *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award on the Merits (20 May 1992) §§ 187 – 188 **[CLA-0230]**.

and (2) third party projections of likely growth in the European market. FTI projected that CD Hungary's issue volume would have increased by 13.8% in 2012 and that this rate of increase would have fallen to 5% in 2016.[874] Next, FTI calculated the revenues flowing from that issue volume. Revenues include (1) issuing commission (assumed to be 1.09% in the projection period, based on the average commission in 2011); (2) reimbursement commission (assumed to be 2.97%, the 2011 average); (3) revenue from lost or expired vouchers (assumed to be 0.3% of issue volume); and (4) financial income (assumed to be 5% of cash flows).[875] Future expenses were then deducted from these revenues. FTI next adjusted these cashflows to take depreciation, overhead costs, capital expenditure, and tax into account.[876] Following the initial projection period, FTI assumes that the business continues after the terminal date.

524. Next, FTI applied a discount rate to the cash flows. The discount rate was initially calculated as CD Hungary's weighted average cost of equity capital ("WACC"), as derived from (1) the risk free rate (calculated at 1.9%, the risk free rate of US government bonds with a 10-year maturity), (2) the equity market risk premium (calculated at 6.01%, representing the expected return on the market portfolio), (3) Beta (0.72%, representing the degree of market risk of the asset, later corrected to 0.96%), (4) country risk premium (3.6%, based on Hungarian equity markets as at December 2011), and (5) small-size premium (2.0%, risks that are mitigated by CD Hungary's position as a subsidiary in a large company).[877]

525. In response to Navigant's comments, the Second FTI Report adjusted the WACC to 12.8%.[878] FTI also adjusted its analysis with respect to the value of the float, and this had a standalone effect of reducing the value of CD Hungary in the but-for scenario by EUR 3.3 million.[879]

526. The alleged "*uncertainty*" in the Hungarian voucher market does not change FTI's but-for scenario analysis. Future legislative change was already reflected in FTI's valuation of CD Hungary in the following ways: (1) prior to 2012, there was a trend of increases in the tax

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[874] C-I §§ 386 – 387; First FTI Report, §§ 4.18, 4.37 **[CEX-1]**.

[875] C-I §§ 94, 388; Extract from Mazars Summary Notes on CD Hungary, "Le Chèque Déjeuner Kft., Hungary", dated 31 December 2009, 31 December 2010, and 31 December 2011 – 31 December 2013, at 6 **[C-0044]**; Dér Statement § 14 **[CWS-1]**; First Nagy Statement, §§ 9 – 10 **[CWS-2]**; First FTI Report, §§ 4.54, 4.61, 4.65 **[CEX-1]**.

[876] C-I § 389; First FTI Report, § A3.12 **[CEX-1]**.

[877] C-I §§ 390 – 391; First FTI Report, §§ A4.1, A4.29 – A4.43 **[CEX-1]**.

[878] C-II § 419; Second FTI Report, § 1.3 **[CEX-2]**.

[879] C-II §§ 425 – 426; Second FTI Report, §§ 2.8 – 3.9 **[CEX-2]** (*correcting* First FTI Report, §§ 4.63 – 4.66 **[CEX-1]**); First Navigant Report, §§ 159 – 160 **[REX-1]**.

exemption limit for meal vouchers, (2) CD Hungary had previously been able to influence voucher related legislation in Hungary, (3) CD Hungary had been able to adapt to unfavorable legislation in the past, (4) changes in legislation are a standard business risk, and (5) a likely buyer of CD Hungary has a portfolio that would diversify away CD Hungary's specific risks. Thus, it is unnecessary to add an additional risk premium to the discount rate.[880]

527. Claimants also pointed out that Respondent overstated the uncertainty associated with the meal voucher market.[881] Respondent was unable to rebut FTI's response to Respondent's criticisms, contained in FTI's Second Report, and Respondent's proposed adjustment must be rejected.[882] First, Claimants clarified that "*Claimants' position is <u>not</u> that CD Hungary was somehow immune from any legislative changes as a result of lobbying but rather that any nondiscriminatory changes would not affect CD Hungary, in part because of its proven ability to prevent or limit their negative effects*."[883] Second, while it may be correct that fringe benefits legislation changed yearly, that is not correct as far as meal vouchers are concerned.[884] Third, Respondent's claim that there was a great deal of legislative uncertainty was contradicted by independent analyses of the industry.[885] Fourth, FTI undermined Navigant's position, which results in a quadruple counting of the effects of any uncertainty.[886]

528. The Hungarian meal voucher market was not ready for dematerialization as of 1 January 2012. At the Hearing, FTI explained that all of the evidence available in 2011 showed that projects mandating dematerialization prior to the 2011 Reform had not made progress because the Hungarian market was not ready.[887] A prospective buyer would not have believed that a law mandating dematerialization would be passed in the short term *i.e.*, within 5 years. Navigant's claims that (1) CD Hungary and its competitors had considered launching or had launched electronic vouchers prior to the 2011 Reform, and that (2) payment card trends were moving in

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880 C-II § 409 – 411; R-I §§ 265, 267; Second FTI Report, §§ 5.39 – 5.41, 6.7, 6.10, 6.12; Appendix 3 §§ A.3.23 – A.3.27 **[CEX-2]**; First Navigant Report, §§ 24, 187 **[REX-1]**.

881 CPHB-I § 195; Second Navigant Report, §§ 143 – 145 **[REX-2]**.

882 CPHB-I §§ 196, 203; Second FTI Report, §§ 5.39 – 5.41, 6.7, 6.10 **[CEX-2]**.

883 CPHB-I § 197 (emphasis in original); Tr. Day 3 at 121:17 – 122:4 (FTI).

884 CPHB-I §§ 198 – 199; R. Closing Slide 26; Tr. Day 3 at 133 (Navigant); PIT Summary Table (1996-2014) **[C-0046]**.

885 CPHB-I §§ 200 – 201; Tr. Day 3 at 64:25 – 65:4 (FTI); Deutsche Bank, Report on Edenred, 16 January 2012 **[AC-14]**; Deutsche Bank, Report on Edenred, 1 July 2010 **[AC-15]**; Redburn, Report on Sodexo, 6 October 2011 **[AC-16]**.

886 CPHB-I § 202; Tr. Day 3 at 65:5-14 (FTI).

887 CPHB-I § 204.

the direction of dematerialization were unconvincing and unsubstantiated.[888] Further, Respondent's 2012 belief that it had no other option but to issue the Erzsébet voucher in paper contradicts Navigant's position that the market was ready for dematerialization at the time.[889] Navigant ultimately concluded at the Hearing that the market was not ready for dematerialization as at the valuation date.[890] Accordingly, the Tribunal should reject Respondent's proposed adjustments to Claimants' framework.[891]

529. The "*but-for*" scenario used by FTI is one where Respondent did not introduce the SZÉP Card, the Erzsébet voucher, or the discriminatory tax framework (the 2011 Reform).[892] In order to calculate Claimants' losses, the actual value of CD Hungary must be deducted from its value in the but-for scenario. Since CD Hungary's business has been completely destroyed, its value in the actual scenario is negative. It carries costs for (1) redundancy and outplacement of staff (HUF 216,423,235 and HUF 18,339,843, respectively), (2) early termination of vehicle rentals (HUF 20,924,432), and (3) lawyers' costs related to pursuing the case before the EC (HUF 55,431,255). These costs form part of the "*financially assessable*" consequences of the breach recoverable under the *restitutio in integrum* principle and as contained in Art. 36 of the ILC Articles. As a result of such expenses, CD Hungary made losses totaling EUR 2,670,000 in 2012 and 2013.[893]

530. Navigant's Alternative But-For Scenario considers that the only breaches alleged by Claimants are the discriminatory tax rate, and constructs a scenario where CD Hungary was able to participate in the SZÉP Card program or issue vouchers subject to the same tax treatment as the SZÉP Card and the Erzsébet voucher.[894] In this scenario, Respondent argues that (1) Claimants' losses should account for a 1.5% commission cap imposed on the SZÉP Card because all other

[888] *Id*., at §§ 206 – 211; Tr. Day 3 at 191:18 – 192:3, 195:2-24, 205 – 208 (Navigant); CD Hungary Internal Memo, Hungary Card Issuance, 7 July 2011 **[NAV-0058]**; Dér Statement, §§ 39 – 40 **[CWS-1]**.

[889] CPHB-I § 212 – 213; Tr. Day 3 at 197 – 209 (Navigant).

[890] CPHB-I § 214; Tr. Day 3 at 201:14-16 (Navigant).

[891] CPHB-I § 215.

[892] C-II § 395; First FTI Report, § 2.8 **[CEX-1]**; Second FTI Report, § 2.5 **[CEX-2]**.

[893] C-I §§ 395 – 398; First FTI Report, §§ 4.106 – 4.107 **[CEX-1]**; *Siemens v. Argentina*, § 352 **[CLA-0028]** / **[RLA-0063]**; "Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries", Yearbook of the International Law Commission, 2 vol. II, Part Two (2001) §§ 1, 34 **[CLA-0081]**; *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Award in respect of Damages (31 May 2002) [hereinafter "*Pope & Talbot v. Canada* Damages Award"], § 85 **[CLA-0096]**; Sergey Ripinsky and Kevin Williams, Damages in International Investment Law, BIICL, 2008, 302-303 **[CLA-0097]**; *Reinhard Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/09/20 and Marion Unglaube v. Costa Rica, ICSID Case No. ARB/08/1, Award (16 May 2012) § 307 **[CLA-0098]**.

[894] C-II § 396 – 397; CPHB-I §§ 216 – 217; First Navigant Report, §§ 116 – 124, 154 – 155 **[REX-1]**.

issuers would have lowered their commission rates in response to the SZÉP Card, (2) CD Hungary would have been obliged to return expired vouchers to the employer instead of retaining the amounts as revenue, and (3) CD Hungary's market share during the forecast period would not have increased. None of these arguments have any bearing on the valuation of Claimants' losses.[895] Respondent has not demonstrated how Navigant's Alternative But-For Scenario could be used to measure the Claimants' losses. It is too speculative to be of any value[896] and this conclusion is not altered by the Award in *Amco*, which concerns the question of the relevance of factors subsequent to an internationally wrongful act when calculating damages.[897] FTI's evaluation of the consequences of the 2011 Reform using the but-for valuation technique is entirely consistent with the *Amco* tribunal's conclusions.[898]

531. The Second FTI Report concludes that the introduction of the SZÉP Card and the Erzsébet voucher would not have affected CD Hungary's business, were the operators of those cards not entitled to more favorable tax treatment. Without that, they would have been ordinary competitors in the voucher market.[899] First, since the market was not ready for dematerialization, the SZÉP Card Issuers could not have succeeded in the market. The SZÉP Card has only taken a limited share of the market, even with the preferential tax rate.[900] Without the preferential tax rate, neither the SZÉP Card nor the Erzsébet voucher issuers would have taken a significant market share from CD Hungary, due to the high barriers to entry in this market, as well as cost differences between the products.[901] In particular, the Tribunal should reject Navigant's change in position that the Erzsébet voucher would have gained 20% of the market, rather than the initial 0% assigned to it,

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[895] C-II § 398 – 399; R-I §§ 295 – 297.

[896] C-II § 402 – 403, 408; Second FTI Report, §§ 4.1, 4.12, 4.26 **[CEX-2]**.

[897] C-II § 404 – 405; R-I § 263.

[898] C-II § 406; *Amco Asia Corp. v. Indonesia*, ICSID Case No. ARB/81/8, Final Award (5 June 1990) § 186 **[RLA-0008]**.

[899] C-II § 407; CPHB-I §§ 218 – 228; Tr. Day 3 at 148 – 152 (Navigant); FTI Opening, slide 13; Second FTI Report, §§ 4.34 – 4.46 **[CEX-2]**; Second Navigant Report, §§ 11, 40 – 41 **[REX-2]**.

[900] CPHB-I §§ 230 – 233; Tr. Day 3 at 62, 77, 80 (FTI).

[901] CPHB-I §§ 234 – 252; Tr. Day 3 at 153 – 170, 172, 175, 176 – 183; First Navigant Report, §§ 32, 37, 108, 124, 236 – 237 **[REX-1]**; First FTI Report, § 3.14 **[CEX-1]**; Second FTI Report, §§ 2.30 – 2.31, 4.37 – 4.40 **[CEX-2]**; Second Navigant Report, §§ 42 – 45, 47 – 50, 114 **[REX-2]**; Wang, "Social responsibility in new ventures: Profiting from a long-term orientation," Strategic Management Journal, February 2012 **[NAV-0049]**; Cheng, Beiting, Ioannis Ioannou, and George Serafeim, "Corporate Social Responsibility and Access to Finance," Strategic Management Journal, accessed 12 July 2016 **[NAV-0050]**; MNB, 2012 Report on Payment Systems in Hungary **[NAV-0057]**; Decree 55-2011 on the Szechenyi Recreation Card **[AC-0007]**; MF Global, Report on Edenred, 29 June 2010 **[AC-0012]**; Deutsche Bank, Report on Edenred, 1 July 2010 **[AC-0015]**.

because Navigant – preparing expert reports in the related *Sodexo* and *Edenred* Arbitrations – was quite familiar with the market when it issued its first report.[902]

532. Putting Claimants in the same position that would have existed had the internationally wrongful act not been committed means that the damages suffered as a result of Respondent's breaches of the BIT by Výroba – a wholly owned subsidiary of CD International that supplied CD Hungary vouchers from 2002 – 2013[903] – must be included. The damages suffered by Výroba are the only consequential damages claimed.[904] Claimants correctly determined the damages related to Výroba as full compensation for the 44% loss of Výroba's business, which it derived from CD Hungary.[905] The losses suffered by Výroba flowed through to Claimants as shareholders in Výroba. Compensation for Claimants' losses must "*include all losses suffered by Výroba as a result of the destruction of the business of CD Hungary's business*."[906] Claimants state that Respondent's submissions confuse the investment protected under the BIT and the damages claimed.[907]

533. FTI considered that Výroba is located in the Czech Republic and conducted its business in Czech koruna and adjusted for inflation appropriately. Like CD Hungary, FTI used the DCF

[902] CPHB-I §§ 245 – 246; *Edenred* Award, 8 and § 544.

[903] C-I §§ 399 – 400; CPHB-I §§ 270 – 272; Extract from the commercial registrar of the Municipal Court of Prague, § C, Le Chèque Déjeuner s.r.o. (CD Czech Republic), 18 May 2017 **[C-0189]**; Extract from the commercial registrar of the Municipal Court of Prague, § C, Le Chèque Déjeuner Výroba s.r.o., 18 May 2017 **[C-0190]**; Extract from the Business Register of the District Court Bratislava I, Le Chèque Déjeuner s.r.o. (CD Slovenska Republica), 18 May 2017 **[C-0191]**.

[904] CPHB-I §§ 173 – 174; First Navigant Report, §§ 243 – 246 **[REX-1]**.

[905] C-I § 401; C-II §§ 412 – 418; R-I §§ 268 – 271; *Chorzów Factory (Claim for Indemnity) (Merits), Germany v. Poland*, 1928 P.C.I.J. Ser. A., No. 17, Judgment No. 13, Award (13 September 1928) **[CLA-0079]**; Meg Kinnear, "Damages in Investment Treaty Arbitration", in Katia Yannaca-Small (ed.), Arbitration under International Investment Agreement, a Guide to the Key Issues, Oxford University Press, 2010 558 **[CLA-0089]**; Sergey Ripinsky and Kevin Williams, Damages in International Investment Law, BIICL, 2008, 89 **[CLA-0226]**; *LG&E v. Argentina* Award, § 31 **[CLA-0229]** / **[RLA-0138]**; Sergey Ripinsky and Kevin Williams, Damages in International Investment Law, BIICL, 2008, 105-106 **[CLA-0234]**; Christopher F. Dugan, Don Wallace Jr., Noah Rubins and Borzu Sabahi, Investor-State Arbitration, Oxford University Press, 2008, 567 **[CLA-0235]**; *Tidewater v. Venezuela*, § 129 **[CLA-0236]**; First FTI Report, §§ 6.10 – 6.25 **[CEX-1]**.

[906] C-II §§ 414 – 417; *see also* Sergey Ripinsky and Kevin Williams, Damages in International Investment Law, BIICL, 2008, 89 **[CLA-0226]**; Sergey Ripinsky and Kevin Williams, Damages in International Investment Law, BIICL, 2008, 105-106 **[CLA-0234]**; Christopher F. Dugan, Don Wallace Jr., Noah D. Rubins and Borzu Sabahi, Investor-State Arbitration, Oxford University Press, 2008, 567 **[CLA-0235]**; *Tidewater v. Venezuela*, § 129 **[CLA-0236]**; *LG&E v. Argentina* Award, § 31 **[CLA-0229]** / **[RLA-0138]**; *Chorzow Factory (Claim for Indemnity) (Merits), Germany v. Poland, 1928 P.C.I.J,* Ser. A., No. 17, Judgment No. 13, Award (13 September 1928) **[CLA-0079]**.

[907] C-II § 413.

methodology for the valuation of Výroba's future lost profits. This was appropriate, since Výroba has a profitable trading history from 1999 to 2011.[908] Respondent's submissions opposing compensation for these losses confuse the investment protection under the BIT and the damages claimed.[909]

534. While Respondent has argued that this would not translate to a one-for-one loss for Claimants, from an economic point of view, the impact of the losses suffered by a 100%-owned group company will be suffered at the group level, by Claimants.[910] Claimants' case is materially different from the *Nykomb* case, as Claimants' damages claim is for Výroba's lost profits only. FTI has deducted all of the elements listed by the Tribunal in *Nykomb* from the income lost as a result of Respondent's breaches of the BIT.[911] The only deduction to Výroba's profits that could be argued to be necessary here would be dividend withholding tax, but no such taxes applied because EU law forbids the application of taxes on dividends distributed by EU companies to their parent companies also incorporated in the EU, as is the case here.[912] FTI's calculation of Claimants' loss of Výroba's profits amounts to EUR 3.8 million.[913]

535. FTI has concluded that Claimants and CD Hungary would have had every incentive to optimize the position of CD Hungary and, therefore, considered various options for minimizing the effect of the 2011 Reform. FTI concluded that CD Hungary took actions to minimize the effect of Respondent's actions.[914]

536. The amount to be awarded to Claimants should account for any tax liability that may be incurred as a result of the Award. Various arbitral tribunals have accepted that compensation is to be paid

[908] C-I §§ 402 – 404; Notarised deed (24 May 2002) **[C-0055]**; "Contrats Mandataires" between Výroba and CD Hungary - 1 January 2004 - 22 December 2008 - 15 December 2010 - 29 August 2011 **[C-0056]**; First FTI Report, § A4.48 **[CEX-1]**.

[909] C-II § 413.

[910] CPHB-I § 273.

[911] CPHB-I §§ 273 – 275; Tr. Day 3 at 58:4-20 (FTI); First FTI Report, §§ 6.10 – 6.25 **[CEX-1]**; *Nykomb v. Latvia*, 39 **[CLA-0065]** / **[RLA-0048]**.

[912] CPHB-I § 277; *see* Council Directive 90/435/EEC, amended by Directive 2003/123/EC.

[913] CPHB-I § 279; FTI's Opening, slide 4.

[914] C-II § 436; Second FTI Report, § 4.53 **[CEX-2]**; First Navigant Report, § 244 **[REX-1]**.

net of any taxes. To the extent that the relevant French taxation provisions differ from those in Hungary, this should be taken into account.[915]

537. The Hearing confirmed that FTI's assessment of Claimants' losses is justified and, thus, reflects an objective view of CD Hungary's expected performance but-for the 2011 Reform, which is the view that a prospective buyer would have taken of CD Hungary's value as of 1 January 2012.[916]

538. Respondent's suggestion that Claimants' losses should be reduced to reflect contemplated legislative changes that did not occur is preposterous.[917] The unrealistic suggestion that CD Hungary would be able to re-enter the market as of 1 January 2017 and that, therefore, the analysis of Claimants' damages should be adjusted to excluded losses beyond that date should be rejected by the Tribunal.[918] In addition, the adjustment should be rejected because the factual premise upon which is based failed to materialize.[919] Further, by maintaining the advantage of the SZÉP Card, the legislative changes enacted in 2017 will likely have the effect of moving the entire meal voucher market to the SZÉP Card, since only the latter will continue to benefit from a significant tax advantage.[920] Finally, there is no legal basis for the adjustment is based entirely on facts subsequent to the valuation date and such facts can only be taken into account to increase the quantum of a party's loss, not the opposite.[921]

539. FTI made two final adjustments to the calculation of Claimants' losses prior to the Hearing, leading to an increase of EUR 0.5 million of the losses suffered by Claimants. These two adjustments were technical and do not alter the general approach taken to valuing Claimants'

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915 C-I § 415; C-II §§ 420 – 423; *Siemens v. Argentina*, § 403(1) **[CLA-0028]** / **[RLA-0063]**; *Saluka v. Czech Republic*, § 389 **[CLA-0049]** / **[RLA-0059]**; *Achmea v. Slovakia* Award, § 333 **[CLA-0237]**.

916 *See generally* CPHB-I §§ 179 – 186.

917 CPHB-I § 253.

918 CPHB-I §§ 254 – 257, 263 – 264; *compare* Tr. Day 3 at 72:15-25 (FTI) and 223:8-19 (Navigant), *see also* Tr. Day 3 at 143:24 – 144:1, 223:4-5 (Navigant); Navigant's Opening Slide 31; Second Navigant Report, § 171 **[REX-2]**.

919 CPHB-I §§ 258 – 262; 266 – 267; Tr. Day 3 at 219:9-23, 220:17-23, 223 – 224 (Navigant).

920 CPHB-I § 265; Tr. Day 3 at 94:9 – 95:25 (FTI).

921 CPHB-I §§ 258, 268 – 269; Mark Kantor, Valuation for Arbitration: Compensation Standards Valuation Methods and Expert Evidence, Kluwer Law, 2008, 65 – 66 **[CLA-0086]**; Irmgard Marboe, "Compensation and Damages in International Law The Limits of 'Fair Market Value'", Transnational Dispute Management Vol. 4, Issue 6 (November 2007) **[CLA-0087]**; *Siemens v. Argentina*, § 360 **[CLA-0028]** / **[RLA-0063]**; *Yukos v. Russia*, §§ 1766 – 1768 **[CLA-0071]**.

losses. The adjustment to the terminal value increases Claimants' losses, but the adjustment related to the WACC tax rate reduces the losses.[922]

2. Respondent's Arguments

540. If the Tribunal finds that the introduction of the SZÉP Card and the Erzsébet voucher are *bona fide* regulations but that the tax differential breached the BIT and caused a total loss of Claimants' investment, Navigant has calculated the appropriate amount of damages, excluding interest, as EUR 7,552,000. If the Tribunal accepts Respondent's argument as to the appropriate compensation standard set forth in Art. 5(2) of the BIT, this amount needs to be further reduced to eliminate the amounts claimed for Výroba's lost profits (EUR 126,000), redundancies, outplacement costs and vehicle lease penalties (EUR 872,707), lawyers' fees (EUR 186,377), and/or the Terminal Value of CD Hungary (EUR 1,422,642).[923]

541. Although some tribunals have awarded compensation under an additional head of damage to "*wipe out the consequences of the wrongful act*", that would only become relevant if the Tribunal declined to apply the standard articulated in Art. 5(2) of the BIT. Claimants must demonstrate that they actually incurred the incidental damages after the breach, including those needed to mitigate harm. Claimants' claims for damages related to (1) redundancy and outplacement costs / equipment costs, (2) lawyers' fees associated with pursuing complaints before the EC, and (3) lost profits associated with Výroba are too remote or unforeseeable (defined as being not reasonably anticipated by both parties as the probably result of the breach at the time of the breach) to be compensable. For the first items, Claimants have not proven the circumstances surrounding these expenditures, why they were incurred, and if they were incurred.[924] The same is true for the lawyers' fees, which were not incurred in the course of fending off particular attacks by Hungary, but were presumably lobbying costs that Claimants incurred as a matter of due course when Claimants elected to challenge Hungary's regulatory powers.[925]

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922 CPHB-I §§ 279 – 281; FTI Opening, Slide 4; Tr. Day 3 at 52:20 – 53:8 (FTI).

923 R-II §§ 354 – 355; Second Navigant Report, Table 1 **[REX-2]**.

924 R-II §§ 329 – 334; C-I § 396; CD Hungary's exceptional Costs, November 2014, § 6.3.3 **[AC-45]**; Sergey Ripinsky and Kevin Williams, Damages in International Investment Law, §§ 5.1, 5.4 and 5.52 (2008) 162 **[RLA-0232]**.

925 R-II §§ 335 – 337; *Pope & Talbot v. Canada* Interim Award, §§ 156, 160, 169 – 170, 181 **[CLA-0014]**; Letter from Edenred, Sodexo and Chèque Déjeuner to Mr. Michel Barnier (European Commissioner, Internal Market and Services) (6 April 2012) **[C-0164]**; *Pope & Talbot v. Canada* Damages Award, § 85 **[RLA-0169]**.

542. Claimants have failed to prove the requisite nexus between their losses and the 2011 Reform. The limited evidence indicates that there were many factors contributing to Claimants' losses. Claimants' 27 March 2012 Hungarian Branch Strategic Meeting Presentation indicates that 32% of Claimants' customers were lost for reasons unrelated to the 2011 Reform and indicated additional factors influenced the Hungarian voucher market.[926]

543. To properly apply the *Chorzow Factory* test, one must identify what the government most likely would and could have legitimately done. The tribunal in *Amco* instructed that, if the purpose is to put the investor in the position it would have been in without the breach, there is no need to assume only data that would have been known to a prudent businessperson at the time. Subsequent known factors bearing on the performance are to be reflected in the valuation technique.[927] Claimants' valuation of CD Hungary is unsound because it improperly assumes away market circumstances and actions that are not in violation of the BIT.[928]

544. Claimants claim that Navigant's Alternative But-For Scenario is too speculative, because it is too difficult to specify the conditions under which the SZÉP Card and the Erzsébet voucher would have been issued, had existing issuers been allowed to participate. Under the BIT, there is nothing that requires that the existing issuers be allowed to participate – only that the criteria for issuers be non-discriminatory.[929] Claimants have maneuvered their claim and now it appears that their true claim relates to the so-called differential tax and not the introduction of the Erzsébet voucher or the SZÉP Card.[930]

545. Claimants' damage analysis is further unsound because it fails to reflect what Hungary did that was consistent with its international law obligations.[931] Claimants do not allege that the

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[926] R-II §§ 300 – 301; Tr. Day 4 at 75:13 – 24 (R. Closing); Presentation, Hungarian Branch Strategic Meeting, Le Chèque Déjeuner (27 March 2012) **[R-0056]** / **[NAV-0066]**.

[927] R-I § 263; *Amco Asia Corp. v. Indonesia*, ICSID Case No. ARB/81/8, Final Award (5 June 1990), § 186 **[RLA-0008]**.

[928] R-II §§ 302 – 304; C-II §§ 397, 400 – 402; C-I §§ 5, 143, 167 – 168; John Barker, *The Different Forms of Reparation: Compensation*, *in* The Law of International Responsibility (Crawford et. al eds., 2010) **[RLA-0208]**; Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law (Oxford Univ. Press 2008) **[RLA-0218]**; Thomas W. Wälde and Borzu Sabahi, *Compensation, Damages, and Valuation in International Investment Law*, 4 Transnat'l Dispute Mgmt. (10 February 2007) **[RLA-0236]**.

[929] R-II § 307; C-II §§ 402, 407; Thomas W. Wälde and Borzu Sabahi, *Compensation, Damages, and Valuation in International Investment Law*, 4 Transnat'l Dispute Mgmt. (10 February 2007) **[RLA-0236]**.

[930] R-II §§ 305 – 306; C-II §§ 401, 407; Dér Statement, § 33 **[CWS-1]**.

[931] R-II § 308.

introduction of the SZÉP Card alone violated the BIT.[932] There is no argument that Respondent was not entitled to create a voucher for a charitable purpose and to distribute it exclusively. Thus, the but-for world must account for the increased competition from the SZÉP Card and the Erzsébet voucher.[933] Further, the 2011 Reform-based SZÉP Card requirements of a 1.5% commission cap for affiliates and zero commission for employers/clients and the requirement to return lost or expired vouchers to employers are not considered wrongful or in violation of international law or the BIT. The competitive impact of these requirements among all voucher issuers reduce Claimants' claim to damages and cannot be assumed away.[934] Claimants' effort to remove the impact of competition from the Erzsébet voucher and SZÉP Card, by claiming that if they were introduced, in the absence of more favorable tax treatment, they would have been the same as any other competitor cannot be successful.[935] While CD Hungary's competitive position would have given Claimants some advantage, this would not be sufficient to preserve their market share indefinitely. Claimants' analysis fails to account for the benefits of the Erzsébet voucher or the SZÉP Card that distinguish them in the market place.[936] The low commissions and the electronic cards would have helped the SZÉP Card compete with competitors' vouchers.[937]

546. Claimants demand compensation based on a DCF valuation model that relies on speculative projections for 2012 – 2016. Damages must be proven with reasonable certainty and speculative hypotheticals must be disregarded. Hypothetical lost profits are typically only included where the anticipated income stream is legally protected. Tribunals have rejected the use of a DCF-based valuation in circumstances where the data was too speculative and unreliable. Here, CD Hungary had no contractual arrangements or other means by which to ground a legally protected interest. It lacked a sufficiently well-established history of dealings to make their anticipated income stream certain.[938]

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[932] R-I § 262; C-I § 257; First Navigant Report, § 123 **[REX-1]**.

[933] R-II § 309.

[934] *Id.*, at §§ 310 – 311; R-I §§ 264, 294 – 298; First Navigant Report, §§ 238 – 241 **[REX-1]**; Second Navigant Report, §§ 102, 105 **[REX-2]**.

[935] R-I §§ 277 – 278; R-II § 312, 315; C-II § 407; Second FTI Report, § 4.34 **[CEX-2]**; First Navigant Report, §§ 190, 242 **[REX-1]**.

[936] R-II § 313; Second Navigant Report, § V(C), §§ 50, 106, 113 **[REX-2]**.

[937] R-II § 314; Second Navigant Report, §§ 50, 102 – 103 **[REX-2]**.

[938] R-I §§ 257 – 260, 272 – 275; *ADC v. Hungary*, § 502 **[CLA-0030]** / **[RLA-0004]**; *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Final Award (24 December 2007) **[RLA-0015]**; *Vivendi v. Argentina* **[CLA-0021]** / **[RLA-0021]**; *Enron v. Argentina*, § 385 **[RLA-0030]**; *Metalclad v. Mexico* **[CLA-0016]** / **[RLA-0043]**; *Siemens v. Argentina*, § 290 **[CLA-0028]** / **[RLA-0063]**; *Siag v. Egypt* **[CLA-0040]**; *Wena v. Egypt*, §§ 28, 123 **[RLA-0077]**; Mark Kantor, Valuation for Arbitration: Compensation Standards Valuation

547. The First FTI Report contains three defects that render the entire model flawed and the resultant valuation inaccurate and inflated: (1) it fails to account for the impact of legitimate measures taken by Hungary that were not in violation of the BIT, (2) it ignores uncertainties that existed in the Hungarian voucher system, and (3) it overstates the loss associated with Výroba by incorrectly ascribing the entirety of lost profits to events in Hungary.[939]

548. Claimants' DCF analysis in the First FTI Report overstates the counterfactual valuation.[940] The First FTI Report made six errors that resulted in overstating CD Hungary's forecasted cashflows. First, by forecasting CD Hungary's issue volumes based only on the 2011 numbers, FTI assumed that volumes would continue to grow at the same pace as in other EU countries with far lower penetration rates. The impact of correcting this error results in a EUR 356,000 reduction in the value of CD Hungary.[941] Second, FTI's assumption that CD Hungary would continue to exhibit higher growth in the forecasted period is unsupported, and is based on a one-time event attributable to the combined tax-free exemption limit for hot and cold meal vouchers that released pent-up demand for cold meal vouchers in 2011. Expectations for wage and job growth as of the Valuation Date were weak. A reasonable buyer would anticipate more moderate growth during the forecast period, beginning at 6 percent in 2012 and declining to 3 percent by the end of the period. This results in a EUR 6.5 million reduction in the value of CD Hungary.[942] Third, FTI overestimates that income from three of CD Hungary's four revenue streams. Sustaining the value of revenue from lost and expired vouchers is unsustainable, given the shift to electronic cards. This results in a EUR 1.1 million reduction in the value of CD Hungary.[943] Fourth, with regard to "*floats*" (financial revenues), FTI's calculations are riddled with errors, which with correction result in a EUR 3.3 million reduction in the value of CD Hungary.[944] Fifth, the FTI Report further assumes that the interest generated from the float will remain constant, contrary to the downward inflation trend in the year preceding the Valuation Date. This results in a EUR 2.8

Methods and Expert Evidence (Kluwer Law International 2008) **[RLA-0098]**; First report on State responsibility by Mr. Roberto Ago, Special Rapporteur – Review of previous work on codification of the topic of the international responsibility of States (Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens), Yearbook of the International Law Commission (Extract) (1969, vol. II) **[RLA-0099]**.

939 R-I § 261; First Navigant Report, §§ 115 – 130 **[REX-1]**.

940 R-I §§ 272, 276; First Navigant Report, § VIII **[REX-1]**.

941 R-I §§ 279 – 281; First Navigant Report, § 138 **[REX-1]**.

942 R-I §§ 282 – 284; First Navigant Report, §§ 141, 147, 149 **[REX-1]**.

943 R-I §§ 285 – 286; First Navigant Report, § 157 **[REX-1]**.

944 R-I § 287; First Navigant Report, § 160 **[REX-1]**.

million reduction in the value of CD Hungary.[945] Sixth, the FTI Report predicts no decrease in client commissions over time, even though this source had shown constant decline since 2007 with only slight recovery in 2011. This results in a EUR 0.74 million reduction in the value of CD Hungary.[946]

549. In their second report, FTI has failed to correct other flaws in their model. First, FTI's assumptions with respect to employment trends are inconsistent with the trends as of the Valuation Date. Second, FTI's projection that CD Hungary would experience an increase in their market share disregards the increasingly competitive environment prior to the Valuation Date, as reflected in CD Hungary's eroding profit margins during those years. Third, FTI excludes the impact that CD Hungary's decision to not transition to using electronic cards would have of CD Hungary's revenues and financial performance. Fourth, FTI's model assumes that CD Hungary's client commissions would increase after the Valuation Date, even though there is no analysis to support this conclusion and it contradicts the falling trend in client commission prior to the Valuation Date. Fifth, FTI's WACC is understated as it (1) understates CD Hungary's cost of debt and (2) fails to add a risk premium for the specific risks to the Hungarian Market.[947] Although the First FTI Report calculated the WACC to be 12.6%, Navigant recommends using the inflation forecast for the projection period through 2016, raising the inflation-adjusted cost of equity to 13.3 %, which results in a EUR 1.6 million reduction in the value of CD Hungary.[948]

550. Claimants' valuation contains assumptions about the voucher market that are not supported by the available evidence. Claimants' analysis overlooks the threat to CD Hungary's business from dematerialization. Although Claimants appear to erroneously state that they were not pursuing dematerialization, evidence indicates that in 2011, CD Hungary developed an advertising campaign promoting its own card.[949] Navigant presents clear and convincing evidence that the transition to electronic cards in Hungary was both inevitable and imminent. In contrast, the only

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945 R-I § 288; First Navigant Report, § 165 **[REX-1]**.

946 R-I § 289; First Navigant Report, §§ 167, 169 **[REX-1]**.

947 R-II § 328; Second Navigant Report, § VII(A)(i)(1) – (3), (6), VII (A)(ii) **[REX-2]**.

948 R-I §§ 290 – 292; First Navigant Report, §§ 172, 187 **[REX-1]**.

949 R-II §§ 316 – 317; Second FTI Report, § 4.10 **[CEX-2]**; Presentation, Benefits of the Card System, Le Chèque Déjeuner (17 June 2011) **[R-0051]** / **[NAV-0059]**.

objective evidence that Claimants' expert relies upon is a 2008 National Bank of Hungary Report – and this report shows that even in 2008, the trajectory of digitization was positive.[950]

551. FTI's valuation also ignores the uncertainty that existed within the fringe benefit system. The Government routinely changed the relevant legal framework, and these changes would have signaled uncertainty to a buyer. Nonetheless, FTI unsoundly assigns no value to this uncertainty and assumes away all risk based on lobbying skills and adaptability. A hypothetical buyer would not assume that CD Hungary's operations would continue exactly as they had in the past, regardless of legislative changes. FTI's analysis is simply unreasonable and not the result of sound methodology.[951]

552. Claimants' valuation improperly includes the terminal value – and this results in a double recovery. The CJEU Decision prompted Respondent to amend the laws challenged here by Claimants. Thus, beginning on 1 January 2016, Claimants' cold meal vouchers would receive the same tax treatment as the Erzsébet voucher. Further, the criteria for becoming a SZÉP Card Issuer have been lessened. The re-establishment of the so-called level playing field has been established. Thus, Claimants have been granted the full reparation that they seek in the form of restitution in-kind, rather than compensation. This analysis must be adjusted to exclude lost profits beyond 1 January 2017. This value represents more than 64% of the claimed damages.[952]

553. FTI attempts to corroborate its results with an alternative "*Market Approach*", to evaluate the reasonableness of the results of the DCF valuation in the but-for scenario by comparing the subject company to others. The uncertainty present on the Valuation Date of 1 January 2012 precludes reliable comparisons. The selected companies Edenred and Sodexo are not comparable – both have different growth and risk prospects as compared with CD Hungary. Ultimately, with respect to Edenred, the FTI Report (1st) reached the same conclusion and acknowledged that Sodexo operates a substantially different type of business, as it is primarily a catering company. Both

950 R-II § 318; National Bank of Hungary, "The payment card business in Hungary", 2008 **[FTI-02]**; Second Navigant Report, § 85 **[REX-2]**.

951 R-I § 265 – 267; R-II §§ 319 – 323; Second FTI Report, §§ 6.3 – 6.10 **[CEX-2]**; *American International Group, Inc. and American Life Insurance Company v. The Islamic Republic of Iran,* Award (December 19, 1983), *reprinted in* 4 Iran-US Cl. Trib. Rep. 96, 107 **[RLA-0009]**; *Occidental v. Ecuador* ICSID Award, § 543 **[RLA-0049]**; PIT Law as amended in 2010, effective 1 January 2011 **[C-0068]**; First Navigant Report, § 94 **[REX-1]**; Second Navigant Report, § 144 **[REX-2]**.

952 R-II §§ 324 – 327; *Glamis Gold v. USA* **[RLA-0033]**; *Mobil v. Venezuela,* § 378 **[RLA-0046]**; *BCB v. Belize*, § 190 **[RLA-0148]**; James Crawford, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries (Cambridge Univ. Press 2002), 218 **[RLA-0215]**; Second Navigant Report, § 170 **[REX-2]**.

companies are significantly more diversified and international than is CD Hungary and would be valued much higher than CD Hungary.[953]

554. Claimants have not supported the damages associated with Výroba. The question of whether a claimant can seek remedy for losses suffered by companies it owns rather than losses it suffered itself has been discussed in the jurisprudence. Respondent argues in that context that *Gemplus* is also instructive in the distinction between claims of a shareholder, as opposed to claims of the company.[954] Reparation serves to compensate an investor for losses it suffered – not for losses suffered by third parties over which the Tribunal has no jurisdiction.[955] The measure for compensation is the change in value of the shareholding and not, as Claimants allege, the loss suffered by Výroba. Here, there is no basis to assume that the entire value of the lost profits incurred by a subsidiary will be experienced in identical magnitude by the shareholder or an indirect shareholder.[956] Here, the damages are attenuated – Claimants are seeking to recover lost profits suffered by a third company (Výroba) in a third country (Czech Republic) which one of the Claimants (CD Internationale) purports to own indirectly through various non-party subsidiaries that have not been properly identified. Claimants have failed to prove that either of them are actually the ultimate shareholder of Výroba. The figure provided by Mr. Nicholson does not demonstrate an actual link between the various alleged owners.[957] Navigant states that CD Hungary owned a 33.2% equity interest in Výroba as of the valuation date.[958] But, even if Claimants had proven that CD Internationale was the ultimate shareholder, Claimants have shown no injury to CD Internationale that would entitle them to compensation – there has been no loss of dividends or decrease in the value of CD Internationale's shareholding resulting from the alleged injury to Výroba. There is no legal or economic basis to assume that the value of the lost

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[953] R-I § 299 – 304; First Navigant Report, §§ 194, 199, 205 **[REX-1]**.

[954] *Gemplus v. Mexico*, §§ 12 – 50 **[CLA-0093]**. *AAPL v. Sri Lanka*, § 95 **[RLA-0146]**; *Khan Resources v. Mongolia*, § 388 **[RLA-0163]**; Sergey Ripinsky and Kevin Williams, Damages in International Investment Law, §§ 5.1, 5.4 and 5.52 (2008) § 155 **[RLA-0232]**.

[955] R-II §§ 343; C-II §§ 416 – 417; *Gemplus v. Mexico*, §§ 12 – 50 **[CLA-0093]**; Second FTI Report, § 4.63 **[CEX-2]**; *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award (27 June 1990) [hereinafter "*AAPL v. Sri Lanka*"], § 95 **[RLA-0146]**; *Khan Resources Inc. & Others v. Government of Mongolia*, UNCITRAL, PCA Case No. 2011-09, Award on the Merits (2 March 2015) [hereinafter "*Khan Resources v. Mongolia*"], § 388 **[RLA-0163]**; Sergey Ripinsky and Kevin Williams, Damages in International Investment Law, §§ 5.1, 5.4 and 5.52 (2008) § 155 **[RLA-0232]**.

[956] R-II § 344 n.566. *Nykomb v. Latvia*, 39 **[CLA-0065]** / **[RLA-0048]**; *LG&E v. Argentina* Award **[CLA-0229]** / **[RLA-0138]** (while measures had caused a significant decrease in revenues of Argentine subsidiaries, the injury to the claimant was in the form of lost dividends.)

[957] R-II §§ 343; Second FTI Report, § 4.63 **[CEX-2]**.

[958] *See* Second Navigant Report, §84 **[REX-2]**; Vyroba's audited financial statements, 2011 [CZ], 11 **[AC-48-d]**.

profits incurred by a subsidiary will be experienced in identical magnitude by the shareholder or even an indirect shareholder. Výroba is not an investor under the BIT and tribunals in similar situations have declined to award damages.[959] Respondent argues that the losses allegedly suffered by Výroba are not recoverable because Výroba is not an Investor under the BIT, nor is it a protected investment.[960] The case *ADM v. Mexico*, where the tribunal determined that it could not award damages allegedly suffered by a subsidiary on the basis that the losses occurred outside of Mexico, is illustrative and consistent with prevailing case law.[961]

555. Výroba's losses were not unforeseeable. It would be reasonable to assume that in the four years since the alleged breach, Výroba would have undertaken steps to mitigate their losses and to turn their focus to other profitable activity.[962] It is instead reasonable to assume that a company like Výroba would, in the intervening four years since the purported breach, undertake steps to mitigate these losses. Navigant reports that Výroba indeed mitigated losses and calculates Navigant's calculation of lost profits of Výroba (in Claimants' corrected "But-For" analysis) amounts to EUR 429,000.[963]

556. Claimants are foreclosed from recovering the damages sought because they failed to take necessary measures to limit the damage sustained. Although Claimants have presented a March 2012 presentation where the need to study diversification was noted, there is no evidence that a study on diversification was conducted or that diversification was attempted. Instead, Claimants simply state that diversification was "*not an option*." FTI then assumes that CD Hungary must have considered diversification because there is no evidence that they did not. Neither statement is sufficient to discharge Claimants' duty to mitigate.[964] This stands in stark contrast to the

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959 R-II §§ 344 – 346; *Nykomb v. Latvia*, 39 **[CLA-0065]** / **[RLA-0048]**; France-Hungary BIT, Art. 1 **[CLA-0001]** / **[RLA-0079]**.; *LG&E v. Argentina* Award **[CLA-0229]** / **[RLA-0138]**; *Canadian Cattlemen for Fair Trade (formerly Consolidated Canadian Claims) v. United States of America*, UNCITRAL, Award on Jurisdiction (28 January 2008) [hereinafter "*Canadian Cattlemen v. USA*"], §§ 194 – 223 **[RLA-0149]**.

960 R-II § 345; France-Hungary BIT, Art. 1 **[CLA-0001] / [RLA-0079]**.

961 *See* R-II § 346 *Midland v. Mexico* **[CLA- 0032]**; *Canadian Cattlemen v. USA*, §§ 194-223 **[RLA-0149]**.

962 R-I §§ 268 – 271, 293; R-II §§ 347 – 348; Extract from Internal CD Hungary presentation (22 June 2009) **[C-0062]**; First Data, "Prepaid Card Issuingand [sic] POS Acquiring Services – Indicative Proposal for Le Chèque Déjeuner Hungary" (4 July 2011) **[C-0135]**; *AIG v. Kazakhstan*, **[CLA-0037]** / **[RLA-0006]**; *Biwater v. Tanzania*, § 785 **[CLA-0017]** / **[RLA-0016]**; Mark Kantor, Compensation Standards Valuation Methods and Expert Evidence, Ch. 2 (2008), 102 **[RLA-0226]**; First Navigant Report, §§ 127, 128, 188 **[REX-1]**; Second Navigant Report, § 95 **[REX-2]**.

963 Second Navigant Report, §§ 94 – 95 **[REX-2]**.

964 R-II §§ 349 – 350; *Gabčíkovo–Nagymaros Project (Hung. v. Slovk.)*, 1997 I.C.J. 7 (25 September 1997) **[RLA-0159]**.

mitigation efforts that LCD's Spanish subsidiary took to adapt to changing legislation in that country.[965]

557. Testimony at the Hearing reaffirmed that Claimants' damages analysis is inherently flawed and cannot form the basis of any Award. Rather than seeking an amount that would make Claimants whole, Claimants seek to be put in a position that they would never have obtained but for breach.[966] Claimants and their expert have conceded that their valuation makes no adjustments for competition or for the introduction of an electronic card.[967] Claimants' model also does not account for a reduction in commission rates and it assumes that the 2011 conditions or something similar would prevail for the indefinite future.[968] Claimants are asking the Tribunal to insulate it from the completely foreseeable and accepted risks of the market, including imminent and inevitable dematerialization.[969]

558. In contrast, Navigant demonstrated a sophisticated understanding of the Hungarian fringe benefit system and of Claimants' business. Navigant's model reflects the fundamental dependence of the system on tax incentives, the risk that a potential buyer would perceive in light of economic and legislative changes, and the multi-faceted impact of the inevitable shift to electronic cards.[970] Navigant's analysis enables the specific damages resulting from the allegedly wrongful acts to be isolated and quantified. Since Claimants do not allege that Respondent was foreclosed from introducing new fringe benefits or regulating issuers thereof, Claimants may only seek compensation for harm flowing from the differential tax treatment.[971] By excluding the introduction of the SZÉP Card and the Erzsébet voucher from the but-for model, Navigant's framework enables the Tribunal to determine a proper quantum of damages, should such calculation prove necessary.[972]

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[965] R-II § 351; Second FTI Report, § 6.8 **[CEX-2]**.

[966] RPHB-I § 18.

[967] *Id.*; Tr. Day 3 at 76:15-24 (Gans and Nicholson) (*confirming* that Mr. Nicholson made no adjustment to his valuation to reflect new competition in the market), *see also* Tr. Day 3 at 82:16-23 (Gans and Nicholson); Tr. Day 3 at 91:2-4 (Gans and Nicholson) (*confirming* that Mr. Nicholson made no adjustment to his valuation to reflect dematerialization in Hungary); Tr. Day 4 at 91:8 – 16 (R. Closing).

[968] RPHB-I § 18; Tr. Day 3 at 88:11-88 (Gans and Nicholson).

[969] RPHB-I § 18; Tr. Day 2 at 69:21-23 (Gans and Nagy) (*agreeing* that Hungary would transition to electronic vouchers).

[970] RPHB-I § 19; Navigant Presentation, slides 7 – 19.

[971] RPHB-I § 19, n. 51.

[972] *Id.*, at § 19.

559. In its closing statement Respondent also pointed out that Mr. Nicholson was instructed that one of the breaches to the BIT was the fact that MNUA undertook a media campaign in relation to the Erzsébet voucher. It is unclear how this could breach the BIT.[973]

3. Tribunal Considerations and Conclusions

560. Above, the Tribunal has found that there was a compensable breach of Art. 5(2) of the BIT, and that the compensation standard is not governed by Art. 5(2) for lawful measures, but rather by the full reparation principle of customary international law. Further, the Tribunal recalls that the Parties accept 1 January 2012 as the Valuation Date.[974] The Tribunal found that the destruction of the value of Claimants' shareholding was permanent at that point in time and accepted Claimants' decision to withdraw from the market in 2013,[975] rendering the costs associated with that withdrawal compensable.

561. The Tribunal recalls that the Parties and their Experts accept that using the DCF method is appropriate in the present case.[976] The Tribunal agrees and now proceeds to examine the experts' application of the DCF method to the present case.

(a) DCF Valuation for Loss to CD Hungary

(i) The Parties' and their Experts' Agreements

562. The Tribunal recalls its conclusion that Respondent intentionally created a state monopoly and evicted CD Hungary from the meal voucher market or, at the very least, it knew that the effect of the 2011 Reform would be that no clients would continue to buy CD Hungary's meal vouchers and that they would instead buy the SZÉP Card and Erzsébet voucher. The but-for calculation must start from that basis to assess the damage Claimants suffered compared to the value of their investment, had such a state monopoly not been established.

563. FTI provided in detail reasons why a five-year projection period is appropriate, given the trading history of CD Hungary and the relative maturity of the Hungarian market (with a 62% penetration

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[973] Tr. Day 4 at 65:3 – 7 (R. Closing).

[974] C-I §§ 379 – 384, 413; R-I § 250.

[975] *See* § 353, *supra*.

[976] CPHB-I § 163; Navigant's Opening Slide 4; Tr. Day 3 at 127:18-22 (Navigant); R-I § 251.

rate), and in view of CD Hungary's rates of growth in the years until 2011.[977] Navigant also uses a five-year projection period for its calculations.[978] The Tribunal agrees that the five-year projection period is appropriate in the present case. The projection period for CD Hungary's cash flows, therefore, spans five years, from 2012 to 2016 while, thereafter, CD Hungary would have only attained growth thereafter in line with the long-term rate of inflation in Hungary.[979]

564. The Experts agree that the appropriate discount rate should be a WACC.[980]

(ii) The Parties and their Experts' Key Areas of Disagreement

565. The Tribunal has considered and refers to the reports of both Experts in assessing the but-for scenario, *i.e.*, that without the introduction of the 2011 Reform. The key areas of disagreement between the reports of FTI and Navigant regarding the but-for valuation of CD Hungary relate to the following:[981]

- Hungary's economic outlook,
- CD Hungary's exposure to legislative risks,
- The market risk from Reforms of 2009 and 2010,
- The impact of SZÉP Card / Erzsébet voucher's entry on the playing field, and
- The effect of transition to electronic cards (dematerialization.

566. Hereafter, to avoid repetition, the Tribunal will address these interlinked areas of disagreement together. The Tribunal's role, as explained in *Gemplus*, is not "*to make a simplistic binary choice between the two very different cases advanced by the two sides*."[982] Rather, as did the PCIJ in *Chorzów*, this Tribunal ascertains damages owed for the treaty violation by reference to the different valuations presented by the Parties and their Experts and bases its conclusions on the valuations, facts, and documents submitted to it.[983] This Tribunal's exercise of its broad

977 First FTI Report, § 7.4 **[CEX-1]**.

978 Second Navigant Report, §§ 30 - 31 **[REX-2]**.

979 Second FTI Report, Table 5-1**[CEX-2]**.

980 First FTI Report, §§ 3.14 – 3.16 **[CEX-1]**; Second Navigant Report, § 141 **[REX-2]**.

981 Navigant Presentation at Hearing (24 May 2017), slide 4.

982 *Gemplus v. Mexico*, §§ 12-57 **[CLA-0093]**.

983 *Compare Chorzów Factory (Claim for Indemnity) (Merits), Germany v. Poland*, 1928 P.C.I.J. Ser. A., No. 17, Judgment No. 13, Award (13 September 1928), 53 – 54 **[CLA-0079]**.

discretion is guided by its aim to conduct these proceedings efficiently, while ensuring fairness to the Parties.[984]

567. Here, the helpful and plausible calculation spreadsheets provided by each Expert, which have been the subject of review and comment by the opposing side, enable the Tribunal to conduct its own calculation based on the factors identified and argued by both sides, without the need to further revert to the Parties for calculations based on the elements that the Tribunal has found persuasive.

568. The assumptions that inform the DCF projections in a fair market value analysis must be based on information that would have been known to a hypothetical buyer as of the Valuation Date. Therefore, it is appropriate to forecast growth in the Hungarian voucher market in accordance with expected wage growth in Hungary as of the Valuation Date.[985] The relevant macroeconomic factors that indicate growth in revenues for the voucher market are: (1) employment growth (increased demand), (2) higher minimum wages, and (3) higher inflation, which increases interest rates, thereby increasing financial revenues earned from the cash float.[986] Contrary to Navigant's assumption of a negative economic outlook as of the Valuation Date,[987] the Tribunal is more persuaded by FTI's assessment of the situation that Hungary's economic outlook was positive as of that date. This would have affected the voucher market in Hungary and particularly CD Hungary's position in it. The issue volumes used by FTI are based on appropriate projections that are supported by actual developments.[988]

569. Legislative risks existed for Claimants from the very beginning of their investment, as Respondent's relevant legislation was updated yearly. As Respondent has explained,[989] employers' incentive to buy vouchers, and the employees' incentives to use them, hinges on preferential tax treatment – *i.e.*, legislation that the Parties agree was updated regularly. Claimants

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[984] *Compare Corn Products v. Mexico*, § 19 (point 8) **[CLA-0033]**.

[985] First FTI Report, Figure 5-1 **[CEX-1]**; First Navigant Report, § 137, Appendix I.2f **[REX-1]**.

[986] First FTI Report, § 3.34 **[CEX-1]** (*citing* AC-19 Table 3-1; AC-8 3); *see also* Second FTI Report, §§ 5.9 – 5.12 **[CEX-2]**.

[987] Navigant based its assumption of a negative economic outlook as of the valuation date on Economist Intelligence Unit, "Hungary Country Forecast," November 2011, 13 **[NAV-12]**, which contains positive indications for Hungary's growth from 2011 – 2016, including growth in employment (and, by extension, Issue Volume) and growth in wages.

[988] Second FTI Report, §§ 5.3 *et seq*. **[CEX-2]**; *see also* First Navigant Report, § 147 **[REX-1]** (*citing* Economist Intelligence Unit, "Hungary Country Forecast," November 2011, 13 **[NAV-12]** (*showing* that employment was projected to increase during the relevant period)).

[989] *Supra*, § V.A.

have shown that they were aware of legislative risk and took it into account and adapted to the yearly changes, including the Reforms of 2009 and 2010. However, the 2011 Reform was different. As concluded above, it was a series of measures that created a state monopoly which was not foreseeable by Claimants and in fact dispossessed them of their investment, in violation of the BIT.

570. The Experts disagree on whether an additional risk premium should be added to CD Hungary's WACC to account for the Hungarian market-specific risks that were present following the 2009 and 2010 voucher market reforms, which resulted in more uncertainty in the voucher market than before.[990] In response to those changes, however, CD Hungary maintained a strong competitive position in the Hungarian voucher market in 2009 and 2010 and it achieved "*our best ever results in 2011.*"[991] The Tribunal, therefore, accepts that CD Hungary's lobbying skills (*i.e.*, its ability to influence legislation) and its ability to adapt to legislative changes would mitigate legislative risk, as shown in their past performance.[992] A hypothetical buyer would have been able to assume that CD Hungary's operations would continue as they had in the past, regardless of legislative changes (as they were to be expected from past practice, but not of the kind that have been found to be a breach above) and how CD Hungary might be able to adapt to further reforms and to what degree this would adversely impact CD Hungary's margins/value. Therefore, the Tribunal finds the additional legislative risk premium of 1.5% to be added to the WACC, as recommended by Navigant, inappropriate.[993] The Tribunal agrees with FTI's use of the 12.8% WACC.

571. Navigant[994] estimated that CD Hungary's market share would gradually decline by approximately one third (33 percent) over the projection period, because the SZÉP Card Issuers established themselves in the hot meal voucher market and took market share from the incumbent issuers. Having found the introduction of the SZÉP Card to be among the measures included in the Treaty breach, however, the Tribunal cannot accept this assumption in the but-for analysis.

572. A potential buyer would have taken the transition to electronic vouchers (dematerialization) into account because dematerialization would result in a reduction in revenues from lost or expired

[990] First Navigant Report, § 187 **[REX-1]**; Second Navigant Report, § 143 **[REX-2]**.

[991] Dér Statement, §§ 32 – 37 **[CWS-1]**.

[992] First FTI Report, §§ 6.3 – 6.7 **[CEX-1]**.

[993] For detailed discussion *see* First Navigant Report, §§ 174 – 177 and 183 – 186 **[REX-1]**.

[994] Second Navigant Report, §§ 44, 113 **[REX-2]**.

vouchers. While the experts agree that dematerialization would take approximately five years, [995] they disagree as to whether dematerialization would have begun on the Valuation Date (as Navigant argues) or after the projection period (as FTI argues). CD Hungary had contemplated dematerialization[996] and was in the process of recruiting a POS contractor in June 2011, should dematerialization become imminent.[997] While dematerialization of vouchers represented a long-term growth opportunity for CD Hungary that the company had studied since 2006, CD Hungary did not consider that by the Valuation Date the Hungarian market was ready for electronic vouchers. The Tribunal agrees that dematerialization was not imminent as of 1 January 2012 and the documentary record confirms that Hungary was not prepared for dematerialization as of that date.[998] Indeed, the 2015 introduction of an electronic card combining the Erzsébet voucher and SZÉP card[999] confirms Hungary's lack of preparedness for dematerialization as of the Valuation Date.[1000]

573. The Experts agree that the revenue from lost/expired vouchers would be 0.3% in Issue Volume at the Valuation Date, based on the actual revenues earned by CD Hungary from 2009 – 2011.[1001] The Tribunal finds this assumption reasonable for the forecast period. Navigant's assumption of a 50% reduction in revenues lost and expired revenues vouchers over the forecast period was based on dematerialization beginning at the Valuation Date – an assumption that the Tribunal has rejected.[1002]

574. While later developments based on new decisions by Respondent after the Valuation Date were not foreseeable for Claimants and, therefore, Claimants' decision to shut down was justified as concluded above, Respondent argues that they must be considered for the calculation of Claimants' future losses. Respondent argues that the CJEU Decision prompted Respondent to amend the laws challenged here by Claimants. Beginning 1 January 2017, cold meal vouchers

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[995] *See* Second FTI Report, §§ 4.21 – 4.22 **[CEX-2]** (five or six years); Second Navigant Report, § 93 **[REX-2]** (five years).

[996] Benefits of the card system, flyer dated 17 June 2011 **[NAV-59]**; First Data, "Prepaid Card Issuingand [sic] POS Acquiring Services – Indicative Proposal for Le Chèque Déjeuner Hungary" (4 July 2011) **[C-0135]**.

[997] First Data, "Prepaid Card Issuingand [sic] POS Acquiring Services – Indicative Proposal for Le Chèque Déjeuner Hungary" (4 July 2011) **[C-0135]**.

[998] *See e.g.*, "Shift to Digital Strategy," Edenred, November 2011 **[NAV-19]**.

[999] Second FTI Report, § 4.14 **[CEX-2]**.

[1000] Second FTI Report, § 4.16 **[CEX-2]**.

[1001] First Navigant Report, § 157 **[REX-1]**; (*accepting* 0.3% as the starting point); First FTI Report, §§ 4.60 – 4.61, Figure 4-5 **[CEX-1]**; Second FTI Report, §§ 5.57 – 5.59 **[CEX-2]**.

[1002] Second Navigant Report, § 132, Appendix I.2g **[REX-2]**.

were to receive the same tax treatment as the Erzsébet voucher and the criteria for becoming a SZÉP Card Issuer were to be lessened. Respondent explains that these changes re-established the so-called level playing field in the relevant market, and support Respondent's argument for excluding the terminal value, as it compensates Claimants in kind, rather than monetarily.[1003] As indicated, however, Respondent has not met its burden of proving the establishment of a level playing field.

575. The Parties' Experts accept that CD Hungary had growth of 13.8% in Issue Volume in 2011.[1004] CD Hungary's average growth rate in Issue Volume was 9.7% over the final two years (2010, 2011), 7.8% over the final three years (2009 to 2011), and 16.5% over the final four years (2008 to 2011).[1005] The Tribunal considers that FTI has sufficiently justified the growth projection of 13.8% for CD Hungary. By contrast, Navigant has provided no sufficient documentary support for its assumption of only 6.0% growth,[1006] for its position that 13.8% growth projected toward the future would be unreasonable, or that the 13.8% growth in 2011 was a one-time event, based on pent up demand or customers pre-ordering vouchers.[1007]

576. Regarding impact of inflation on financial revenues, Navigant's review of CD Hungary's historic financial revenues from 2006 through 2011, after adjusting for inflation, shows that CD Hungary's real return varied from negative 2.8 percent to positive 2.2 percent,[1008] and that the average real interest rate was just 0.2 percent and the median was 0.5 percent over this period.[1009] Navigant's analysis, if accurate, relies on an IMF Report that reports the true, rather than forecasted, inflation rates for the projection period and is, thus, not appropriate for use in the but-for scenario.[1010] Instead, the Tribunal is more persuaded by FTI's assessment, which references a 2015 IMF Report that contains the actual and the then-projected values for each year.[1011] FTI's

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[1003] R-II §§ 324 – 327.

[1004] First FTI Report, § 4.30 **[CEX-1]**; First Navigant Report, § 140 **[REX-1]**.

[1005] First FTI Report, § 4.30 **[CEX-1]** (*citing* RSM DTM Hungary, Cafeteria 2012, 7 December 2011 **[AC-6b]** – **[AC-6f]**).

[1006] First Navigant Report, § 149 **[REX-1]**.

[1007] Second Navigant Report, §§ 140 – 142 **[REX-2]**.

[1008] *Id.*, at § 134, Appendix J.

[1009] *Id.*

[1010] *Id.*, at Appendix J.

[1011] IMF World Economic Outlook, Inflation expectations updated 28 September 2015 **[FTI-9]**.

analysis was based on CD Hungary's prior performance and relies on information that a prospective buyer would have had at the Valuation Date.[1012]

577. Further, the Tribunal notes the competitive pressures facing the voucher market in 2009 – 2011 and CD Hungary's strategy of pursuing government clients at particularly low client commission rates.[1013] The Parties appear to rely on the same graph reflecting the historic trend of CD Hungary's Client Commission percentage.[1014] FTI and Navigant agree that it is appropriate to use Edenred as a benchmark for client commissions,[1015] but neither Expert has provided Edenred's Client Commissions for Hungary.[1016] Edenred's client commission rate from its global operations was 1.6% in 2010.[1017] Unable to report Edenred's Client Commissions, FTI reports that the Erzsébet Client Commission rates ranged from 3.1% – 3.5% from 2012 – 2014, which was higher than the 1.09% Client Commissions projected for Claimants.[1018] Navigant's assumption in Appendix I.2c in the Corrected Framework, which is provided without documentary support, is that Cold Voucher Commissions would be pressured to 0.75% due to competition with SZEP and Erzsébet, Hot Voucher Network fees would be restricted to 1.5%, and Client Commissions would be restricted to 0% due to SZEP.[1019] While the Tribunal cannot consider the effects of competition with the Erzsébet Voucher and the SZÉP Card in the but-for scenario, it is nonetheless noteworthy that the Erzsébet Client Commission rates ranged from 3.1% – 3.5% from 2012 – 2014, which was higher than the 1.09% Client Commissions projected for Claimants. The Tribunal is, therefore, not persuaded that it would be reasonable as at the Valuation Date to project that Client Commissions would decrease by approximately 2% per year until 2016.[1020]

[1012] First FTI Report, § 4.65, Figure 4-6 **[CEX-1]**; Second FTI Report, § 5.48 **[CEX-2]**.

[1013] First Navigant Report, §§ 166 – 169 **[REX-1]**.

[1014] *See id.*, at Figure 14 **[REX-1]**; First FTI Report, Figure 4-3 **[CEX-1]**.

[1015] Second Navigant Report, § 135 **[REX-2]** (*citing* First Navigant Report, §§ 166 – 169 **[REX-1]**), First FTI Report, § 4.46 **[CEX-1]**; Second FTI Report, § 5.53 **[CEX-2]**.

[1016] Second FTI Report, §§ 5.53 **[CEX-2]**.

[1017] First FTI Report, § 4.46 **[CEX-1]** (*citing* Crédit Suisse, Report on Edenred, 27 July 2011, p 10 **[AC-8]**).

[1018] Second FTI Report, § 5.55**[CEX-2]**.

[1019] Second Navigant Report, Appendix 1.2, Tab 1.2c **[REX-2]**.

[1020] *Compare* First Navigant Report, §§ 166 – 169 **[REX-1]**.

578. CD Hungary did not have any debt at the Valuation Date, and while the Experts do not disagree with FTI's inclusion of debt in the WACC, Navigant states that FTI's calculation of CD Hungary's WACC is understated.[1021]

579. FTI's calculation of CD Hungary's cost of debt relies as a benchmark on interest coverage ratios of Edenred SA, Sodexo Pass International, Wex, and Fleetcor and thereby applies a rating of AA which is the second-highest credit rating available.[1022] Navigant points out that such a rating equates the credit rating of CD Hungary to that of large, multinational, diversified parent companies and that the other four companies relied on in comparison by FTI are significantly larger and more diversified than CD Hungary.[1023] FTI explains that CD Hungary is a wholly owned subsidiary of Claimants – which is not disputed – with debt held at the parent company level. That capital structure has no necessary connection with the risks of the Hungarian voucher industry.[1024] The Tribunal does not find it unreasonable to calculate CD Hungary's debt based on debt held at the parent company level: CD Hungary's parent company in France is a large multi-national company. Navigant has not provided sufficient evidentiary support for the need for an additional 1% to be added to the cost of debt. The Tribunal, therefore, declines to add an additional 1% premium on CD Hungary's cost of debt, as recommended by Navigant.[1025]

580. The Tribunal has considered the Experts positions regarding the comparable companies analysis that FTI used to cross-check its results. Indeed, while the analysis does not prove the accuracy of FTI's analysis, it does not weaken it as alleged by Navigant. In any event, the Tribunal has not relied on it as such in its deliberations. The damages to be awarded in this case are based on a factors analysis of each input in each Expert's report. The comparable companies and comparable transactions analyses, while interesting, did not assist in the assessment of each variable of the Expert's DCF models, and have ultimately had no impact on the Tribunal in reaching its conclusions.

581. The Experts disagree regarding the acceptance of a Terminal Value, (*i.e.*, value of lost cash flows beyond the projection period). FTI maintains that following the standard approach in business valuation, a Terminal Value must be added to the net present value of the cash flows in the

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[1021] Second Navigant Report, § 141 **[REX-2]**.

[1022] First FTI Report, Appendix 4, "Cost of debt ratings" worksheet **[CEX-1]**.

[1023] Second Navigant Report, § 142 **[REX-2]**.

[1024] Second FTI Report, § 3.15 **[CEX-2]**; First FTI Report, 2 **[CEX-1]**.

[1025] Second Navigant Report, § 142 **[REX-2]**.

projection period. To determine this Terminal Value, FTI assumes that in the period beyond 2016, CD Hungary would have grown at no more than the projected long-term rate of inflation in Hungary, being 3%, which the Tribunal accepts as an accurate projection of Hungary's long-term inflation rate as at the Valuation Date. [1026]

582. Navigant argues that the Terminal Value should be excluded.[1027] The Tribunal agrees with FTI that, indeed, it is standard practice to include a Terminal Value and sees no reason not to do so in the present case. Respondent dispossessed Claimants of an investment with long-term income generating prospects, and the proper compensation to be awarded is its fair market value as of the Valuation Date. At the time of dispossession, there was no prospect that after a certain period, Hungary would annul the legislative measures in breach of the BIT, as it now has. The BIT provides that the fair market value must be established as of the Valuation Date, with the information which a prospective buyer would have had at that time. There is, thus, no reason to deduct the terminal value in CD Hungary's DCF model.[1028]

583. The Tribunal notes that Claimants sought to amend their Terminal Value with the result that the Terminal Value would increase, during the Hearing. While the Tribunal believes that Claimants have met their burden of proof in establishing the Terminal Value and that this proposed modification does not change that, it rejects the Claimants' late amendment to the Terminal Value. As this change was only introduced by the Expert in his oral testimony and then by Claimants only in the post-hearing brief, and since there was no 2nd round of post-hearing briefs, Respondent has not had an opportunity to object. Further, the Tribunal does not find that Claimants provided the Tribunal sufficient evidence demonstrating what was changed or how, as only the results of the new calculation was provided. Accordingly, the Tribunal does not accept the purported correction.

(iii) Resulting damages for CD Hungary

584. Taking into account all the above considerations regarding CD Hungary (without Výroba and without interest, both of which will be discussed hereafter), based on Respondent's breach of the BIT, the Tribunal accepts FTI's calculation of damages to CD Hungary as summarized in FTI's second report, Appendix Four Tab "Total Losses."

[1026] First FTI Report, §§ 497, 498 **[CEX-1]**.

[1027] Second Navigant Report, § 68 **[REX-2]**.

[1028] The same conclusion was reached in the *Edenred* Award, §§ 620 – 622.

585. Accordingly, the damages suffered by CD Hungary are **EUR 23,196,000**.

(b) Losses Associated with Výroba

586. The Parties agree that Výroba is a third company located and incorporated in the Czech Republic, and that Výroba supplied Claimants' paper vouchers. The Parties dispute whether losses suffered by Výroba are compensable in these proceedings, whether Výroba is 100% owned by either of the Claimants and, if so, whether and to what extent such losses are compensable.

587. The Tribunal shares the view expressed in *Gemplus* cited by Respondent and in other jurisprudence[1029] that the payment of damages resulting from a breach of a treaty serves to compensate an investor for "*losses it has actually suffered – not for losses suffered by third parties over which the tribunal has no jurisdiction*."[1030]

588. The Claimants seek to recover lost profits suffered by a third company (Výroba) in a separate country (Czech Republic) that one of the Claimants (CD Internationale) purports to own indirectly through various different subsidiaries that are not parties to or part of the relevant investments. Výroba is neither an "Investor" nor a protected investment under the BIT. The BIT defines "*investment*" as assets established "*in accordance with the legislation of the Contracting Party in whose territory or maritime zones the investment was made.*"[1031] Indeed, as pointed out by Respondent, the case *ADM v. Mexico* deals with a similar scenario and thus is illustrative. In that case, the claimant's investment was a Mexican distributor of corn syrup that was manufactured in the US. As part of their damages claim, the claimants sought compensation for the US subsidiary's lost sales of corn syrup that could have been sold in Mexico. The tribunal determined that it could not award such damages on the basis that the losses had occurred outside of Mexico. This conclusion is consistent with prevailing case law.[1032] A similar conclusion was reached in the *Canadian Cattlemen* case though this was a decision under NAFTA.[1033]

[1029] *Khan Resources v. Mongolia*, § 388 **[RLA-0163]**.

[1030] R-I § 340 – 341; *Gemplus v. Mexico*, § 12-50 **[CLA-0093]**; *AAPL v. Sri Lanka*, § 95 **[RLA-0146]**.

[1031] Art. 1 of the France-Hungary BIT **[CLA-0001] / [RLA-0079]**.

[1032] R-II § 346; *ADM v. Mexico* **[CLA-0032]**.

[1033] *Canadian Cattlemen v. USA*, §§ 194-223 **[RLA-0149]**.

589. Therefore, without the need to examine further the Parties' dispute regarding the evaluation of the claim of EUR 3.8 million raised regarding Výroba,[1034] that claim has to be dismissed.

XI. INTEREST

A. CLAIMANTS' ARGUMENTS

590. In its post-hearing submission, Claimants stated that the interest accrued on Claimants' losses amounts to EUR 12.1 million as of 22 September 2017.[1035]

591. Based on Art. 5(2) paragraph 3 of the BIT, the calculation of the interest payable by Respondent should not be limited to a calculation of the "*taux de marché approprié*" in the BIT, but should be defined by consideration of what would fully compensate Claimants. This Tribunal should be guided by the principle of *restitutio ad integrum* under international law, as expressed in Art. 38 of the ILC Articles.[1036] The appropriate interest rate should take into account the amount of compensation that the amount awarded would have earned, had it been paid after the expropriation.[1037]

592. Interest shall be calculated as the EURIBOR, plus 6.01% to reflect equity market risk premium. Interest shall accrue annually from 2 January 2012 and compound annually until the date of payment.[1038] EURIBOR is a reasonable interbank rate and represents a risk-free rate of interest on investments.[1039] The use of such a rate in isolation is disadvantageous, requiring the application of a surcharge to the applicable rate.[1040]

[1034] C I § 432; CPHB-I § 279.

[1035] CPHB-I § 282; *compare* C-II §§ 433 – 434 (interest applied 1 April 2016 totalled EUR 8.7 million).

[1036] C-I §§ 406 – 407; "Responsibility of States for Internationally Wrongful Acts", 53 UN GAOR Supp. (No. 10) at 43, UN Doc. A/56/83 (2001) Art. 38(1) **[CLA-0080]**; *RosInvest v. Russia*, § 684 **[CLA-0099]**.

[1037] C-I § 408; *Siemens v. Argentina*, § 396 **[CLA-0028]** / **[RLA-0063]**; *Yukos v. Russia*, §§ 1682 – 1685 **[CLA-0071]**; Sergey Ripinsky and Kevin Williams, Damages in International Investment Law, BIICL, 2008, 373 **[CLA-0100]**.

[1038] C-I §§ 405, 413 – 415.

[1039] *Id.*, at §§ 409 – 410; *Gemplus v. Mexico*, §§ 16 – 23 **[CLA-0093]**; Irmgard Marboe, Calculation of Compensation and Damages in International Investment Law, Oxford University Press, 2009, paras. 6.130 and 6.137 **[CLA-0101]**; First FTI Report, § 2.5 **[CEX-1]**.

[1040] C-I § 411; Irmgard Marboe, Calculation of Compensation and Damages in International Investment Law, Oxford University Press, 2009, § 148 **[CLA-0102]**; *Alpha v. Ukraine*, § 514 **[CLA-0103]**; John Y. Gotanda, "The Unpredictability Paradox: Punitive Damages and Interest in International Arbitration", Transnational Dispute Management, Vol. 7, issue 1 (April 2010) 30 **[CLA-0104]**.

B. RESPONDENT'S ARGUMENTS

593. The BIT mandates that the interest for expropriation claims should be calculated based on an "*applicable market rate*." The appropriate market rate should be the market lending rate or a commercial lending rate, not the market premium which is used to assess the market return on equity. Further, if Claimants seek compensation in EUR, a EUR-based market lending rate should be applied – not a market risk premium calculated for the US market.[1041]

594. While Respondent agrees with using the EURIBOR, it alleges that Claimants' proposed interest rate using the EURIBOR plus 6.01 percent to reflect the equity market risk premium is overstated.[1042]

C. TRIBUNAL CONSIDERATIONS AND CONCLUSIONS

595. The Tribunal recalls its conclusion above that Respondent has breached Art. 5(2) of the BIT and that its measures were not a lawful, but rather an unlawful dispossession. Therefore, the limitation for the interest on compensation in case of a lawful dispossession in Art. 5(2) to a calculation of the "*taux de marché approprié*" cannot be applied.

596. Rather, guidance should be taken from the principle of *restitutio ad integrum* under international law[1043] as reflected in Art. 38 of the ILC Articles, which states:[1044]

> *Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.*

597. Therefore, as stated by the tribunal in *Siemens v. Argentina*,[1045] the appropriate rate of interest should take into account "*the interest rate the amount of compensation would have earned had it been paid after the expropriation*", in order to give effect to the principle of full reparation.

1041 R-I §§ 306; R-II §§ 352 – 353; France-Hungary BIT, Art. 5(2) **[CLA-0001]** / **[RLA-0079]**; First Navigant Report, § 251 **[REX-1]**.

1042 R-I § 305.

1043 *RosInvest v. Russia*, § 684 **[CLA-0099]**.

1044 Responsibility of States for Internationally Wrongful Acts (2001), 53, UN GAOR Supp. (No. 10) at 43, U.N. Doc. A/56/83 (2001), Art. 38(1) **[CLA-0080]**.

1045 *Siemens v. Argentina*, § 396 **[CLA-0028]** / **[RLA-0063]**; *see also Yukos v. Russia*, §§ 1682-1685 **[CLA-0071]**; and Sergey Ripinsky and Kevin Williams, "Damages in International Investment Law", BIICL, 2008, 373 **[CLA-0100]**.

598. The Parties agree that using the EURIBOR is appropriate for the determination of interest in the present case.

599. Though, as pointed out above, the ruling in Art. 5(2) of the BIT for lawful dispossessions cannot be applied here, because Respondent's measures were unlawful and a breach of the BIT, guidance can still be taken from the fact that Art. 5(2) provides the "*applicable market rate*." While the Tribunal has carefully considered Respondent's and Navigant's views regarding the appropriate market rate,[1046] the Tribunal agrees with Claimants that EURIBOR plus 6.01% is appropriate in the circumstances of the present case.

600. According with the standard practice in recent investment arbitration,[1047] from 2 January 2012, the interest shall accrue annually and be compounded annually until the date of payment.

XII. COSTS

A. CLAIMANTS' POSITION

601. In their Reply Statement of Costs dated 26 January 2018, Claimants state that their total amount of costs, expenses, and fees in respect of the arbitration proceedings, is **EUR 3,570,753.76 plus USD 450,000**.[1048]

602. Claimants request that the Arbitral Tribunal order Hungary to pay all these costs, expenses, and fees including the legal fees and expenses incurred by UP and CD Internationale.

603. Claimants explained that their request is based on the "*costs follow the event*" principle and on the fact that Claimants have brought their claims to arbitration fairly and have used their best effort to achieve an efficient resolution of the dispute. In the event that the Tribunal were to find Respondent liable, but for a lower amount of damages, the Tribunal must still order Respondent to pay the entirety of Claimants' costs incurred, because reparation must wipe out the

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1046 R-I § 306; First Navigant Report, § 250 **[REX-1]**.

1047 *See e.g.,* ICSID Award of 30 November 2017, in *Bear Creek Mining Corporation v. Republic of Perú* (ICSID Case No. ARB/14/21); *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB 06/18, Award (28 March 2011), at § 360; *Flughafen Zürich A.G. and Gestión e Ingeniería S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19 Award (18 November 2014) at 968; *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB 11/25 Award (10 March 2015) at 949; *Siemens v. Argentina*, §§ 399 – 401 **[CLA-0028]** / **[RLA-0063]**; *Vivendi v. Argentina*, at §§ 9.6.1 – 9.6.2 **[CLA-0021]** / **[RLA-0021]**.

1048 Claimants' Letter (26 January 2018). The amount of USD 450,000 corresponds to the ICSID lodging fee and the advances made by Claimants to ICSID until 26 January 2018, which were "subject to any adjustment by ICSID."

consequences of the illegal act and restore the situation that would have existed without such acts. Here, absent these illegal acts, there would have been no arbitration and, thus, no related fees or expenses. To restore the situation that would have existed in the absence of Respondent's illegal actions, Claimants must, therefore, be awarded their entire costs incurred in connection with these proceedings. Respondent's alleged good faith and professional behavior (which are denied) are irrelevant in this regard.

604. Respondent's suggestion that Claimants should be penalized for their efforts to preserve the initial hearing dates are ludicrous.

605. Respondent is not permitted to claim reimbursement of the VAT, and its expert fees are excessive, amounting to nearly 40 percent more than Claimants' expert costs. This is especially so, given that Navigant has served as expert in other similar cases.

B. RESPONDENT'S POSITION

606. In its first Submission on Costs also dated 12 January 2018, Respondent states that its costs in respect of the arbitration proceedings are **HUF 647,284,339.00 plus USD 1,384,447**.[1049]

607. Respondent argues that the circumstances of this case warrant an award of full costs for Respondent, without apportionment. If Respondent prevails in these proceedings, there is no sound policy reason to prevent a successful host State from obtaining the benefit of a "*cost follows the event*" or "*loser pays*" rule.

608. Regarding apportionment, Respondent requests that, even if Respondent were to not wholly prevail, it should not be required to pay any portion of Claimants' costs or their share of the administrative costs because it presented good faith defenses in a straightforward and professional manner. Alternatively, Respondent argues that the most appropriate apportionment would be for the Parties to share in the costs of the proceedings equally and for each to bear its legal costs. There is no inconsistency between Respondent's entitlement to full costs should it prevail, and the fact that Claimants should not be reciprocally entitled to any costs award against Respondent should the Tribunal even partially grant Claimants' claims. The reason for this is the distinction between the nature of Claimants' manifestly unfounded claims on the one hand and Respondent's measured response to those claims on the other.

[1049] Respondent's Letter (12 January 2018). The amount in USD includes the amounts advanced by Respondent to ICSID until 12 January 2018 to cover the costs of the proceeding.

609. Claimants' unreasonable and non-cooperative behavior aggravated costs in many ways. Their failure to precisely state their claims or provide basic information to Respondent forced Respondent to undertake substantial independent investigation and adjust its defense to respond to a number of speculative scenarios. Next, Claimants complicated their late notification of Mr. Dávid Pusztai's attendance at the Hearing by failing to provide appropriate assurance regarding his involvement in the case. Claimants complicated matters related to the unforeseen and unavoidable delay in the December Hearing by resisting postponement. Similarly, Claimants challenged Respondent over a number of inconsequential procedural matters, including Respondent's effort to resolve an inadvertent procedural matter. Their aggressive tactics hindered and delayed the Parties' ability to make simple procedural arrangements and otherwise increased costs.

610. Claimants' arguments that they are entitled to costs are without merit, as Respondent's notice related to the *Achmea* Decision was appropriate.

C. Tribunal Considerations and Conclusions

611. The applicable arbitration rules are Art. 61(2) of the ICSID Convention and Rule 47(1)(j) of the ICSID Arbitration Rules. They allow the Tribunal a degree of discretion.

612. The Tribunal will first address the question of how the arbitration costs shall be apportioned between the Parties, because the evaluation of the amounts claimed by a party will only be relevant for the Tribunal's decision insofar as the Tribunal finds that a party has to reimburse to the other party some of the costs that party incurred.

613. In this context, the Tribunal takes into account the following. First, Respondent failed in its objection to jurisdiction as decided in this Tribunal's Decision on Preliminary Issues of Jurisdiction dated 3 March 2016. The Tribunal does not share Respondent's view[1050] that this failure should not be taken into account, because its objection was raised in good faith and engaged a novel question of law on which other tribunals have held differently (including, notably, the *Edenred* tribunal), and because Respondent agreed to resolve the jurisdictional issue on the preliminary basis with a view towards reducing costs for both Parties, were the objection to be upheld. While the Tribunal does not doubt that Respondent made its objections to jurisdiction in good faith, this does not change the fact that it failed with these objections and that

[1050] Respondent's First Cost Submission (12 January 2018), § 17.

particularly the separation of the procedure on jurisdiction caused a considerable delay and part of the total costs of this procedure.

614. Second, Respondent failed on the question of liability, as the Tribunal concluded that Respondent's measures were in breach of Art. 5(2) of the BIT. This part of the proceedings was the major part of the dispute and caused the major part of the time and costs of the case.

615. Third, regarding Quantum, Respondent partially prevailed, as the Tribunal awarded only the amount of EUR 23,196,000, plus interest, of the total of EUR 39,465,434 requested by Claimants. With rounding, this amounts to nearly 60% of Claimants' claim.

616. Taking the above considerations into account, including the considerable work involved in the procedural matters regarding Respondent's jurisdictional motion where Claimants ultimately prevailed, the Tribunal considers it appropriate and fair that Respondent shall bear 75% of the costs reasonably claimed by Claimants.

617. In view of this decision, the Tribunal only has to examine whether and to which extent the costs requested by Claimants are to be considered appropriate and reasonable and therefore subject to reimbursement according to Art. 61(2) of the ICSID Convention.

618. Though objecting to bearing any costs claimed by Claimants by apportionment, Respondent has not objected to the calculation of the costs claimed by Claimants.[1051] Indeed, the Tribunal also considers that the costs claimed by Claimants are reasonable.

619. The costs of the arbitration, including the fees and expenses of the Tribunal and the Tribunal's Assistant, ICSID's administrative fees and direct expenses, amount to (in USD):[1052]

Arbitrators' fees and expenses	
Professor Dr. Karl-Heinz Böckstiegel	356,001.86
The Honourable L. Yves Fortier QC	146,883.31
Sir Daniel Bethlehem QC	121,236.20
Assistant's fees and expenses	68,716.48
ICSID's administrative fees	170,000
Direct expenses (estimated)[1053]	136,729.48

[1051] Respondent's Second Costs Submission (26 January 2018).

[1052] The ICSID Secretariat will provide the parties with a detailed Financial Statement of the case account once all invoices are received and the account is final.

[1053] This amount includes estimated charges relating to the dispatch of this Award (courier, printing and copying).

Total	**999,567.33**

620. The above costs have been paid out of the advances made by the Parties in the amount of USD 1,149,788, of which USD 574,950 were paid by Claimants and USD 574,838 were paid by Respondent.[1054] As a result, each Party's share of the costs of arbitration amounts to USD 499,783.67.

621. In conclusion, the Tribunal finds that Respondent has to bear its own costs of arbitration, and has to reimburse 75% of the **EUR 3,570,753.76** requested by Claimants as legal fees and expenses as well as 75% of the **USD 524,783.67**[1055] corresponding to the expended portion of the Claimants' advances to ICSID and the ICSID lodging fee, ***i.e.* EURO 2,678,065.32 plus USD 393,587.75**.

622. The rate of interest found above to be applicable for the damages awarded also has to be applied to this payment for arbitration costs, however only from the date this amount is due, *i.e.* from the date of this Award.

For convenience, in order to facilitate the signing of the Award by the members of the Tribunal, the Decisions and Signatures are placed below on a separate page.

[1054] The remaining balance will be reimbursed to the Parties in proportion to the payments that they advanced to ICSID.

[1055] This amount in USD includes the amounts advanced by Claimants to defray the costs of the proceeding and the ICSID lodging fee paid by Claimants.

XIII. DECISIONS

623. For the above reasons, the Tribunal decides as follows:

1. **Respondent breached Art. 5(2) of the BIT between France and Hungary signed in Paris on 6 November 1986.**

2. **Respondent shall pay to Claimants damages amounting to EURO 23,196,000.**

3. **Respondent shall bear its own costs of arbitration and shall reimburse Claimants 75% of Claimants' total arbitration costs, i.e. 75% of the expended portion of Claimants' advances to ICSID and the ICSID lodging fee (USD 393,587.75), and of Claimants' legal fees and expenses (EURO 2,678,065.32).**

4. **Respondent shall pay, on the above amount of damages awarded, i.e. EURO 23,196,000, interest at a rate of EURIBOR plus 6.01% compounded annually from 2 January 2012 until date of payment.**

5. **Respondent shall pay, on the above amounts of arbitration costs to be reimbursed to Claimants according to Decision No. 3 above, interest at a rate of EURIBOR plus 6.01% compounded annually from the date of this Award until date of payment.**

6. **All other claims are dismissed.**

Sir Daniel Bethlehem QC
Arbitrator
Date: 24 September 2018

The Honourable L. Yves Fortier QC
Arbitrator
Date: 19 September 2018

Prof. Dr. Karl-Heinz Böckstiegel
President of the Tribunal
Date: 20 Sept. 2018