

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

**SODEXO PASS INTERNATIONAL SAS**

Claimant

and

**HUNGARY**

Respondent

**ICSID Case No. ARB/14/20**

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**AWARD**

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*Members of the Tribunal*

Professor William W. Park, President

Mr. Andrea Carlevaris

Mr. John Christopher Thomas QC

*Secretary of the Tribunal*

Ms. Aïssatou Diop

*Assistant to the Tribunal*

Dr. Jill Goldenziel

*Date of dispatch to the Parties: 28 January 2019*

## REPRESENTATION OF THE PARTIES

### *Representing Sodexo Pass International SAS:*

Mr. Philippe Cavalieros  
Ms. Janet (Hyun Jeong) Kim  
Simmons & Simmons LLP  
5 Boulevard de la Madeleine  
75001 Paris  
French Republic

Dr. András Szecskay  
Dr. György Wellmann  
Szecskay Attorneys at Law  
P.O. Box 1228  
1245 Budapest  
Hungary

### *Representing Hungary:*

Ms. Kiera S. Gans  
Ms. Natalie R. Kanerva  
DLA Piper LLP (US)  
1251 Avenue of the Americas  
New York, New York 11231  
United States of America

Dr. András Nemescsói  
Dr. David Kohegyi  
Dr. Zsófia Deli  
DLA Piper Posztl, Nemescsói, Györfi-Tóth  
and Partners Law Firm  
Csörsz u. 49-51  
1124 Budapest  
Hungary

Dr. Beatrix Bártfai  
Dr. András Lovas  
Sárhegyi & Partners Law Firm  
Árvácska u. 6  
1022 Budapest  
Hungary

Dr. Norbert Álmos Tátrai  
Government Office of the Prime Minister  
Vám u. 5-7  
1011 Budapest  
Hungary

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## TABLE OF SELECTED ABBREVIATIONS/DEFINED TERMS

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings April 2006
Beneficial Aggregate Tax Rate	Aggregate Tax Rate applicable to Fringe Benefits payable on the actual value of the Fringe Benefits
BIT	Treaty between the Government of the Republic of France and Hungary Concerning the Encouragement and Reciprocal Protection of Investments (signed on 6 November 1986)
BVI	Business Volume Issued
BVR	Business Volume Reimbursed
C-[#]	Claimant's Exhibit
CJEU	Court of Justice of the European Union
Cl. Mem.	Claimant's Memorial on the Merits dated 1 October 2015
Cl. PHB	Claimant's Post-Hearing Brief dated 12 July 2017
Cl. Reply	Claimant's Reply on the Merits dated 8 August 2016
CL-[#]	Claimant's Legal Authority
EBIT	Earnings before interest and taxes
EC Amicus Curiae	<i>Amicus Curiae</i> Brief filed by the European Commission dated 14 September 2018
Erzsébet Act	Act CIII of 2012 on the Erzsébet Program, enacted into law on 13 July 2012 and entered into force on 21 July 2012
Erzsébet Decree	Decree No. 39/2011 of the Minister of Public Administration and Justice on the Issuing of

	Erzsébet Vouchers, issued on 29 December 2011 and entered into force on 1 January 2012
FIDESZ	Hungarian political party
Foundation	Runs the Erzsébet Program
Fringe Benefits	Benefits provided by employers to employees in kind, in addition to salary earnings
General Aggregate Tax Rate	Normal Aggregate Tax Rate payable on gross income
Hearing	Hearing on the Merits held on 2-4 May 2017
HUF	Hungarian Forints
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
K&H	<i>MKB Nyugdíjpénztárt és Egészségpénztárt Kiszolgáló Kft.</i>
Meal Vouchers	Instruments that carry a tax benefit provided by employers to employees that can be used to purchase hot and cold food at affiliated restaurants and shops
MFN	Most Favored Nation
MKB	<i>MKB Nyugdíjpénztárt és Egészségpénztárt Kiszolgáló Kft.</i>
MNÜA	<i>Magyar Nemzeti Üdülési Alapítvány /</i> Hungarian National Holiday Fund
OTP	<i>MKB Nyugdíjpénztárt és Egészségpénztárt Kiszolgáló Kft.</i>
PIT	Personal Income Tax
R-[#]	Respondent's Exhibit

Resp. C-Mem.	Respondent's Counter-Memorial on the Merits dated 29 January 2016
Resp. PHB	Respondent's Post-Hearing Brief dated 12 July 2017
Resp. Rej.	Respondent's Rejoinder on the Merits dated 14 November 2016
RL-[#]	Respondent's Legal Authority
Service Company	Erzsébet Voucher Distributor LLC, Erzsébet voucher issuer
Sodexo	Sodexo SA
Special Aggregate Tax Rate	Aggregate tax rate applicable to certain fringe benefits payable on the actual value of the Fringe Benefit
SPH	Sodexo Pass Hungary Ltd., the Claimant's Hungarian subsidiary
SPI or Claimant	Sodexo Pass International s.a.s.
SZÉP Card	Széchenyi Recreation Card, electronic voucher card introduced by the SZÉP Decree
SZÉP Decree	Decree No. 55/2011 issued on 12 April 2011 and entered into force on 13 April 2013
Tr. Day [#] [page:line]	Transcript of the Hearing (as revised by the Parties on 20 June 2017)
Tribunal	Arbitral tribunal constituted on 7 April 2015



## **I. INTRODUCTION**

1. This present dispute has been submitted to the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”) on the basis of the Treaty between the Government of the Republic of France and the Government of the Republic of Hungary Concerning the Encouragement and Reciprocal Protection of Investments, which entered into force on 30 September 1987 (the “BIT” or “Treaty”) and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the “ICSID Convention”).
2. Claimant Sodexo Pass International SAS (“Sodexo” or the “Claimant”), a company incorporated under the laws of France, has been represented, as noted above, by Mr. Philippe Cavalieros, Ms. Janet (Hyun Jeong) Kim, Dr. András Szecskay, Dr. András Dániel László (until 1 February 2018), and Dr. György Wellmann.
3. Respondent Hungary (Magyarország) (the “Respondent”) has been represented, as noted above, by Ms. Kiera S. Gans, Ms. Natasha Kanerva, Mr. András Nemescsói, and Mr. David Kohegyi.
4. The Claimant and the Respondent are collectively referred to as the “Parties.”
5. This dispute relates to tax reforms undertaken by Hungary between 2010 and 2013 which subjected meal vouchers, such as the ones offered by the Claimant, to the tax treatment that affected Claimant’s investment in Hungary.

## **A. PROCEDURAL HISTORY**

### **(1) Overview**

6. On 30 July 2014, ICSID received a request for arbitration of the same date from Sodexo against Hungary, together with Exhibits C-1 through C-18, and Legal Authorities CL-1 through CL-9 (the “Request”).

7. On 15 August 2014, the Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.
8. The Parties agreed to constitute the Tribunal in accordance with Article 37(2)(a) of the ICSID Convention as follows: the Tribunal would consist of three arbitrators, one to be appointed by each Party and the third, presiding arbitrator to be appointed by agreement of the Parties.
9. The Tribunal is composed of William W. Park, a national of the United States and Switzerland, as President, appointed by agreement of the Parties; Andrea Carlevaris, a national of Italy, appointed by the Claimant; and John Christopher Thomas, a national of Canada, appointed by the Respondent.
10. On 7 April 2015, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the "Arbitration Rules"), notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Aïssatou Diop, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.
11. In accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the Parties on 26 May 2015 by teleconference.
12. Following the first session, on 17 June 2015, the Tribunal issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters, together with Annex A detailing a Procedural Timetable for the proceedings (the "Procedural Timetable"). Procedural Order No. 1 provides, *inter alia*, that the applicable Arbitration Rules would be those in effect from 10 April 2006, that the procedural language would be English, and that the place of proceeding would be London, United Kingdom, unless from a costs

perspective, it would be more suitable to hold the hearing in Washington D.C., United States.

13. On 18 June 2015, the Tribunal issued Procedural Order No. 2, recording the agreement of the Parties that the Hearing on the Merits would be held in Washington D.C., from 1-5 May 2017.
14. In accordance with Procedural Order No. 1, Claimant submitted its Memorial on the Merits on 1 October 2015, together with Exhibits C-19 through C-54, Legal Authorities CL-10 through CL-125, the Witness Statement of [REDACTED] dated 4 September 2015, the Witness Statement of [REDACTED] dated 27 August 2017, the Witness Statement of [REDACTED] dated 15 September 2015, the Expert Report of [REDACTED] dated 1 October 2015, and the Expert Opinion of [REDACTED] dated 23 September 2015.
15. On 29 January 2016, Respondent submitted its Counter-Memorial on the Merits, together with Exhibits R-1 through R-45, Legal Authorities RL-1 through RL-108, the Witness Statement of [REDACTED] dated 29 January 2016, the Witness Statement of [REDACTED] dated 29 January 2016, the Witness Statement of [REDACTED] dated 22 January 2016, and the Expert Report of [REDACTED] and [REDACTED] of [REDACTED] dated 29 January 2016, with accompanying Exhibits [REDACTED] through [REDACTED] and Appendix A through Appendix D.
16. On 26 February 2016 and 15 April 2016, Respondent and Claimant, respectively submitted their document production requests to the Tribunal. The Tribunal issued its decision on the requests in Procedural Order No. 3 dated 5 May 2016.
17. On 8 August 2016, Claimant submitted its Reply on the Merits and Quantum dated August 8, together with Exhibits C-55 through C-95, Legal Authorities CL-126 through CL-157, and the Rebuttal Report of [REDACTED] dated 8 August 2016, with accompanying Exhibits AF.1.1 through AF18.2, and Appendix 1 through Appendix 14.

18. On 17 October 2016, Respondent requested and Claimant agreed to a one week-extension to the Procedural Timetable to file its Rejoinder. On 14 November 2016, Respondent submitted its Rejoinder, together with Exhibits R-46 through R-74, Legal Authorities RL-109 through RL-161, the Second Expert Report of [REDACTED] and [REDACTED] [REDACTED] with accompanying Exhibits [REDACTED] through [REDACTED], and Appendix E.
19. On 14 February 2017, the President of the Tribunal held, on behalf of the Tribunal, a pre-hearing organizational meeting with the Parties by telephone conference. Pursuant to the organizational meeting, the Parties submitted a joint hearing protocol which was transmitted to the Tribunal on 21 February 2017.
20. On 21 April 2017, a letter from Respondent stated that Respondent has decided not to call [REDACTED] for cross-examination, but that this decision should not be deemed an acceptance of his witness statement. Respondent also requested Tribunal's permission to introduce Sodexo Pass Hungary Ltd.'s ("SPH") Hungary Strategic Plan (2010) into the record.
21. On 26 April 2017, the Tribunal granted leave for Respondent to submit immediately SPH's Hungary Strategic Plan (2010) for Tribunal examination, with the caveat that the Tribunal would decide on admissibility and use of that document in witness examination, reserving decision on whether it will accord Claimant an opportunity to make additional written submissions in connection with the 2010 SPH Strategic Plan.
22. On 26 April 2017, Respondent submitted the SPH Strategic Plan (2010), tentatively marked Exh. R-0081
23. A hearing on the Merits took place from 1-4 May 2017 at the World Bank Headquarters in Washington, D.C. (the "Hearing"). The following persons were present at the Hearing:

*Tribunal:*

Professor William W. Park	President
Mr. Andrea Carlevaris	Arbitrator
Mr. John Christopher Thomas QC	Arbitrator

*ICSID Secretariat:*

Ms. Aïssatou Diop

Secretary of the Tribunal

*For the Claimant:*

*Counsel:*

Mr. Philippe Cavalieros  
Mr. Eric Bloom  
Ms. Janet (Hyun Jeong) Kim  
Mr. Boldizsár Bálint

Winston & Strawn  
Winston & Strawn  
Winston & Strawn  
Winston & Strawn

Mr. András László  
Mr. György Wellmann

Szecskay Attorneys at Law  
Szecskay Attorneys at Law

*Parties:*

[REDACTED]

[REDACTED]

*Witnesses:*

[REDACTED]

[REDACTED]

*Experts:*

[REDACTED]

[REDACTED]

*Graphics*

Mr. Joshua Ryder

Winston & Strawn

*For the Respondent:*

*Counsel:*

Ms. Kieran Gans  
Ms. Natasha Kanerva  
Ms. Rachel Hamilton

DLA Piper New York  
DLA Piper New York  
DLA Piper New York

Ms. Aurelie Ercoli  
Mr. Andras Nemescsoi  
Mr. Dávid Kőhegyi  
Ms. Zsófia Deli  
Mr. Andras Lovas  
Ms. Viktoria Perényi  
Mr. Réka Boros

DLA Piper Washington D.C.  
DLA Piper Budapest  
DLA Piper Budapest  
DLA Piper Budapest  
Sárhegyi and Partners Law Firm  
Sárhegyi and Partners Law Firm  
Sárhegyi and Partners Law Firm

*Parties*

[REDACTED]

*Witnesses:*

[REDACTED]

*Experts:*

[REDACTED]

[REDACTED]

*Court Reporter:*

Dawn Larson

B&B Reporters

*Interpreters:*

Tamas Schild  
Peter Koczoh  
Sandor Mesterhazy

*CIL Practice Fellow*

Christine Sim

Observer

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

*On behalf of the Claimant:*

[REDACTED]

[REDACTED]

*On behalf of the Respondent:*

[REDACTED]

[REDACTED]

25. On 14 June 2017, the Tribunal wrote to the Parties indicating that its analysis might benefit from seeing the December 2016 award in the *Edenred v. Hungary*<sup>1</sup> arbitration, discussed *inter alia* at pages 816 and 817 of the Transcript for the Third Day of Evidentiary Hearings (4 May 2017). Accordingly, the Parties were requested to make the text of the award available to the Tribunal. The Parties' exchanges on *Edenred v. Hungary* award extended over a significant period. Consequently, the Tribunal will address that matter in a separate section below.
26. On 23 June 2017, the Parties notified the Tribunal that they had agreed to simultaneous submission of their respective Post-Hearing Briefs on 12 July 2017. They also proposed to submit their respective statements of costs by 15 September 2017.
27. On 2 July 2017, the Tribunal received a message from the Parties, via Claimant, that they do not intend to file updated submissions on costs or further comment on each other's submissions on costs.
28. On 3 July 2017, Claimant's and Respondent's Experts [REDACTED] and [REDACTED] submitted a joint statement of closure costs to the Tribunal. Experts agreed that if Claimant is entitled to Closure costs, the amount of HUF 425,234,451 or € 1,353,603 is reasonable.
29. On 12 July 2017, the Parties simultaneously submitted their Post-Hearing Briefs.
30. On 19 July 2017, Claimant submitted a letter to the Tribunal confirming that it elected not to submit a separate document of observations, pursuant to Article 16.3.2 of Procedural

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<sup>1</sup> *Edenred S.A. v. Hungary*, ICSID Case No. ARB/13/21.

Order No. 1, on Respondent's request to introduce the 2010 Strategic Plan. Claimant also objected to Respondent's belated request, made in its Post-Hearing Brief, to introduce new objections and new evidence. Claimant noted that Respondent raised an objection on ripeness for the first time at the hearing without seeking leave from the Tribunal to do so.

31. On 20 July 2017, Respondent replied that it had requested and received leave from the Tribunal to add SPH's 2010 Strategic Plan to the Record, pursuant to Article 16.3 of Procedural Order No. 1, and that Claimant had chosen not to comment on the document. Respondent argued that, as it explained during the hearings, it was compelled to raise an objection regarding the *Achmea* case because of its position in the *Edenred v. Hungary* annulment proceedings and because of the relevance of developments in the *Achmea* case to the Tribunal. Respondent also argued that its objection on ripeness was not new, because the issue was initially raised in its Rejoinder. Moreover, Claimant's case evolved from its initial claim of expropriation in 2012 to expand to cover matters implemented through 2017.
32. On 31 July 2017, Respondent submitted a letter to the Tribunal expressing concern regarding Mr. Andrea Carlevaris's rejoining his prior firm BonelliErede. As of September 2017, Mr. Carlevaris will be co-leading the international arbitration practice with Mr. Laurence Shore, who is on the counsel team representing Le Chèque Déjeuner and C.D. Holding Internationale (now UP and C.D. Holding Internationale, respectively) in ICSID proceedings against Hungary related to the same measures at issue in Sodexo Pass International s.a.s. ("SPI"). Respondent requested Mr. Carlevaris to provide the Tribunal with information regarding safeguards during the interviewing process and going forward in relation to these matters to be certain that Hungary's rights are protected.
33. On 2 August 2017 Mr. Carlevaris replied that he and Mr. Shore were interviewed separately before joining BonelliErede, and had not discussed the SPI case other than a mention of involvement during the interview process. Mr. Carlevaris said that if Mr. Shore



planned to be involved in the *Le Chèque Déjeuner v. Hungary*<sup>2</sup> case after 1 September, an appropriate disclosure will be made at that time.

34. On 2 August 2017, Respondent informed the Tribunal that no further action regarding the issue of Mr. Carlevaris's new employment was required at that time.
35. On 29 September 2017, Claimant notified the Tribunal that its representatives Philippe Cavalieros and Janet Kim changed law firm from Winston and Strawn to Simmons & Simmons.
36. The Tribunal acknowledged this change by letter on 6 October 2017.
37. The Parties filed their costs submissions 17 October 2017.
38. The proceeding was closed on 27 November 2018.

## **(2) The *Edenred v. Hungary* Case**

39. As noted above, the Tribunal's interaction with the Parties in connection with the *Edenred v. Hungary* case, which spanned two months, makes it appropriate to set forth separately the procedural history in that connection.
40. On 14 June 2017, the Tribunal wrote to the Parties indicating that its analysis might benefit from seeing the December 2016 award in the *Edenred v. Hungary* arbitration, discussed inter alia at pages 816 and 817 of the Transcript for the Third Day of Evidentiary Hearings (4 May 2017). Accordingly, the Parties were requested to make the text of the award available to the Tribunal.
41. On 15 June 2017, Respondent objected to the Tribunal's request to produce *Edenred v. Hungary*, arguing that consideration of the *Edenred v. Hungary* decision would be prejudicial and unfair to Hungary because the award includes the *Edenred v. Hungary* tribunal's treatment of legal issues, legal measures, and facts similar to those in the instant case. Respondent also argued that the *Edenred v. Hungary* award contains factual

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<sup>2</sup> *UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35.

inaccuracies and that both Parties exercised their rights to choose different counsel in the *Edenred v. Hungary* and *SPI v. Hungary* cases. Accordingly, this Tribunal's review of *Edenred v. Hungary* would frustrate these choices. Finally, if the Tribunal were to require production of the *Edenred v. Hungary* award nonetheless, Respondent requested that it be redacted to omit the recitation of certain facts and confidential financial information belonging to Edenred.

42. On 19 June 2017, Claimant objected to Respondent's proposal to redact the *Edenred v. Hungary* award, noting that the Tribunal presumably requested to see the award precisely because of the similar factual contexts and legal issues involved. Allowing Respondent to redact the award would remove the award's context and the basis for the ruling, and would potentially allow Respondent to redact the award to its liking. Claimant disputes Respondent's argument that production would frustrate Respondent's choice of counsel, since Hungary is represented by the same counsel in all three food voucher cases (*SPI v. Hungary*, *Edenred v. Hungary*, and *Le Chèque Déjeuner v. Hungary*). Claimant submitted that Procedural Order No. 1, § 24, was sufficient to address confidentiality concerns, but expressed willingness to submit to a more specific agreement if ordered.
43. On 26 June 2017, the Tribunal directed that the *Edenred v. Hungary* award be disclosed to the arbitrators, redacted with respect to Edenred's confidential information only, but not regarding the facts of the case. The Tribunal directed counsel to confer on the redaction process and submit the award no later than 7 July 2017.
44. On 7 July 2017, Respondent submitted to the Tribunal the *Edenred v. Hungary* award issued on 13 December 2016 redacted per the Tribunal's instructions. According to Respondent's email, redactions made reflected the agreement of the Parties.
45. On 19 July 2017, Claimant noted that Hungary had commented on and cited to the redacted *Edenred v. Hungary* award in its Post-Hearing Brief, allegedly in violation of the Tribunal's instruction that the award be produced without commentary by either side, a fact to be considered in relation to awarding costs.

46. On 20 July 2017, Respondent replied that it had not understood the Tribunal's email of 15 July 2017 to mean to foreclose it from commenting on the *Edenred v. Hungary* award in its Post-Hearing Brief. Respondent therefore objected to Claimant's request that these actions should be considered by the Tribunal when awarding costs.
47. On 27 July 2017, The Tribunal took note of Claimant's letter of 19 July and reserved decision on whether it will consider those concerns expressed in it when determining cost allocation. The Tribunal also invited Claimant to submit its own comments on the *Edenred v. Hungary* award within seven days.
48. On 7 August 2017, Claimant submitted its comments regarding the *Edenred v. Hungary* award.
49. On 11 August 2017, Respondent submitted a letter to the Tribunal requesting to make brief comments on the *Edenred v. Hungary* award.
50. On 14 August 2017, the Tribunal granted Hungary its requested opportunity for limited comment on the *Edenred v. Hungary* award, to be filed by 18 August 2017.
51. On 18 August 2017, Respondent submitted to the Tribunal its comments on the *Edenred v. Hungary* award.

### **(3) EC Intervention**

52. On 3 August 2018, the European Commission submitted to the Tribunal an application for leave to intervene as a non-disputing party. The Tribunal invited comments by the Parties to be submitted by 14 August 2018.
53. On 23 August 2018, after reviewing the Parties' comments, the Tribunal granted the European Commission leave to submit an amicus brief of no more than 15 pages to be filed within three weeks, with simultaneous comments by the Parties to follow within two weeks after the EC's filing. Thereafter, the record will be closed, absent express invitation by the Tribunal for any further submissions.

54. On 14 September 2018, the EC filed its NDP submission, as directed. The EC filed Annexes EC-9 to EC-12 on 18 September 2018. The Parties submitted their respective comments on 1 October 2018.

**(4) The *UP v. Hungary* Award**

55. On 11 October 2018, Claimant requested the Tribunal to order Respondent to produce the final award in the *UP v. Hungary* case (formerly known as *Le Chèque Déjeuner*). The final award in *UP v. Hungary* had been released 24 October 2018.
56. On 19 October 2018, the Tribunal admitted the *UP (formerly Le Chèque Déjeuner) v. Hungary* award into the record and ordered its production by Respondent. The Tribunal invited the Parties to submit their comments on the *UP (formerly Le Chèque Déjeuner)* award by 26 October 2018. On 22 October 2018, the Tribunal granted Respondent's request to extend the deadline to 7 November 2018.
57. On 7 November 2018, Respondent produced the *UP v. Hungary* award to the Tribunal. The Parties simultaneously submitted to the Tribunal their respective comments. Respondent noted that "[a]lthough Hungary would have preferred to produce a redacted version of the Award given the confidential nature of the information contained therein, because the Award in its entirety has now been made public by unauthorized sources, we have here attached an unredacted version."

**B. SUMMARY OF PARTIES' REQUESTS AND TRIBUNAL CONCLUSIONS**

58. Claimant requests that the Tribunal (i) declare that Hungary has violated its obligations under the France-Hungary BIT (the "BIT") and international law; (ii) order Hungary to pay compensation for the losses incurred by SPI, which it ultimately estimated at €78,249,549 plus interest;<sup>3</sup> (iii) order Hungary to bear all the costs and expenses of arbitration; (iv) pay

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<sup>3</sup> For discussion of the discrepancy between Claimant's original damages claim and this estimate of €78,249,549 plus interest, see Tribunal analysis *infra*.

interest on amounts awarded; and (v) grant Claimant any other relief that the Tribunal deems just and proper.<sup>4</sup>

59. Respondent requests that the arbitration be dismissed, with all costs awarded to Hungary.<sup>5</sup>

60. For reasons discussed below, a majority of the Tribunal (“the Majority”) has been persuaded that Claimant’s shareholdings in SPH were unlawfully expropriated by Respondent Hungary, with liability pursuant to Article 5(2) of the BIT, and an entitlement to recovery in an amount of €72,881,361 with interest as set forth below.

61. Mr. Thomas has submitted a separate and dissenting opinion, concurring with the Majority’s result but setting forth different reasoning. The Majority comments on this separate and dissenting opinion in Part X of this Award.

## **II. FACTUAL BACKGROUND**

### **A. THE CLAIMANT AND ITS ENTRANCE INTO THE HUNGARIAN MARKET**

62. [REDACTED]

63. [REDACTED]

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<sup>4</sup> Claimant’s Pre-Hearing Skeleton, at para. 87.

<sup>5</sup> Respondent’s Pre-Hearing Skeleton, para. 91.

<sup>6</sup> RfA, para. 11; Cl. Mem., para. 25.

<sup>7</sup> RfA, para. 28.

<sup>8</sup> Cl. Mem., para 46; Assistance agreement (13 August 1993), Section I, (Exhibit C-26).

[REDACTED]

64. [REDACTED]

65. [REDACTED]

**B. WHAT ARE FRINGE BENEFITS?**

66. [REDACTED]

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<sup>9</sup> C-26, p.2.

<sup>10</sup> Ibid.

<sup>11</sup> RfA, para. 28; Cl. Mem., paras. 43 and 46; SPH Deed of Foundation (3 June 1993) (Exhibit CEX-7).

<sup>12</sup> RfA, para. 10 ; Cl. Mem., para. 43.

<sup>13</sup> RfA, paras. 11-12 ; Cl. Mem., para. 24.

<sup>14</sup> RfA, para. 13.

<sup>15</sup> Resp. C-Mem., para. 40; RfA, para. 23

<sup>16</sup> Cl. Mem., para. 21 ; Resp. C-Mem., para. 25.

<sup>17</sup> Resp. C-Mem., para. 40 ; RfA, para. 24

[REDACTED]

**C. THE WORKINGS OF A VOUCHER SYSTEM**

67. [REDACTED]

- | [REDACTED]
- | [REDACTED]
- | [REDACTED]
- | [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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<sup>18</sup> Resp. C-Mem., para. 27.

<sup>19</sup> Cl. Mem., para. 26; Resp. C-Mem., para. 28.

<sup>20</sup> Cl. Mem., para. 28.

<sup>21</sup> Cl. Mem., para. 28; Resp. C-Mem., para. 30.

[REDACTED]

**D. THE HUNGARIAN TAX REGIME AND THE INTRODUCTION OF THE MEAL VOUCHER PROGRAM**

71. [REDACTED]

[REDACTED]

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<sup>22</sup> Cl. Mem., para. 31; Resp. C-Mem., para. 31.

<sup>23</sup> Cl. Mem., para. 30; Resp. C-Mem., para. 47.

<sup>24</sup> RfA, paras. 45-48.

<sup>25</sup> RfA, para. 50.

<sup>26</sup> Resp. C-Mem., para. 53.



[REDACTED]

**E. REFORMS TO THE FRINGE BENEFITS SYSTEM**

**(1) The 2010 Tax Reforms**

73. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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<sup>27</sup> Cl. Mem., para. 53; Resp. C-Mem., paras. 52-53.

<sup>28</sup> RfA, para. 27.

<sup>29</sup> Cl. Mem., para. 50.

<sup>30</sup> Cl. Mem., para. 58, citing Official Gazette No. 2009/95 (VII. 8.) Act LXXVII of 2009 on Statutory Amendments Aimed at Transforming the Tax System; Act CXVI of 2009 on legislative amendments relating to incentivizing savings and Act CXV of 2009 on private entrepreneur and private entrepreneur company.

<sup>31</sup> Cl. Mem., para. 59.

<sup>32</sup> Cl. Mem., para. 59.

<sup>33</sup> Cl. Mem., paras. 64-65; Witness Statement of [REDACTED]

77.

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[REDACTED]

[REDACTED]	[REDACTED]	[REDACTED]
	[REDACTED]	[REDACTED]
	[REDACTED]	[REDACTED]

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[REDACTED]

<sup>34</sup> Resp. C-Mem., para. 57, citing *OECD Economic Surveys: Hungary 2010*, OECD 2010/2, at 9 (February 2010) (RL-0081).

<sup>35</sup> Counter-Memorial, para. 57, citing David Jolly, *IMF Bailout Lifts Hungarian Markets*, N.Y. Times (October 29, 2008) (RL-0099).

<sup>36</sup> Counter-Memorial, para. 58, citing *Hungary: The PM Resigns?* Stratfor Global Intelligence (March 23, 2009) (Exhibit RL-0098); Nicholas Kulish, *Hungary's Premier Offers to Resign*, N.Y. Times (March 22, 2009) (RL-0101); John Nadler, *Is Hungary the Financial Crisis' Next Iceland*, Time (March 24, 2009) (RL-0104); Thomas Escritt, *Bajnai Takes Helm in Hungary*, Financial Times (April 14, 2009) (RL-0095); and *PM Promises Pain*, The Budapest Times (April 20, 2009) (RL-0105).

<sup>37</sup> Cl. Mem., paras. 64-65; Counter-Memorial, para. 59; Cl. Reply, para. 27.

[illegible]

<sup>39</sup> Act CXVII of 1995 on Personal Income Tax, as amended by Act CXXXIII of 2010 on the amendment of tax and public contribution laws, the act on accounting and the act on the chamber of auditors and further tax and customs laws implementing EU regulations, in force as of 1 January 2011 (CL-0003). It was proposed as Bill No. 1376 by the Government in October 2010 and was enacted into law on 19 November 2010.

<sup>44</sup> Resp. C-Mem., para. 65.

85.

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<sup>45</sup> Resp. C-Mem., para. 66.

<sup>46</sup> Resp. C-Mem., para. 67.

<sup>47</sup> Resp. C-Mem., para. 68.

<sup>48</sup> Cl. Mem., paras. 69-71; Resp. C-Mem., para. 70.

90.

[REDACTED]

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[REDACTED]

[REDACTED]

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<sup>49</sup> Cl. Mem., para. 76; SZÉP Decree No. 55/2011 (IV.12) (13 April 2011) (CL-0018); Resp. C-Mem., para. 77.

<sup>50</sup> Cl. Mem., para. 77.

<sup>51</sup> Cl. Mem., para. 78; Resp. C-Mem., para. 79.

<sup>52</sup> RfA, para. 58.

<sup>53</sup> Cl. Mem., para. 81.

[REDACTED]

[REDACTED]

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[REDACTED]	[REDACTED]	[REDACTED]
	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
	[REDACTED]	[REDACTED]
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[REDACTED]

<sup>54</sup> Resp. C-Mem., para. 82.

<sup>55</sup> Cl. Mem., para. 83.

<sup>56</sup> Cl. Mem., para. 85; Resp. C-Mem., paras. 81-82.

96.

[REDACTED]

[REDACTED]

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<sup>57</sup> Cl. Mem., para. 89.

<sup>58</sup> Cl. Mem., paras. 90-92.

<sup>59</sup> Cl. Mem., para. 121; Resp. C-Mem., para. 90.

<sup>60</sup> Cl. Mem., paras. 94-95.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]	[REDACTED]	[REDACTED]
	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
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<sup>61</sup> Cl. Mem., paras. 97-100.

<sup>62</sup> Cl. Mem., para.104.

<sup>63</sup> Cl. Mem., paras. 105-106.

<sup>64</sup> Cl. Mem., para. 107.




<sup>65</sup> Cl. Mem., paras. 130-132.

<sup>66</sup> Cl. Mem., paras. 132-134.

[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
	[REDACTED]	[REDACTED]	[REDACTED]
	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
	[REDACTED]	[REDACTED]	[REDACTED]
	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
	[REDACTED]	[REDACTED]	[REDACTED]
	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
	[REDACTED]	[REDACTED]	[REDACTED]
	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
	[REDACTED]	[REDACTED]	[REDACTED]
	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
	[REDACTED]	[REDACTED]	[REDACTED]
	[REDACTED]	[REDACTED]	[REDACTED]

**F. THE EC’S INFRINGEMENTS PROCEEDINGS**

103. [REDACTED]  
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[REDACTED]  
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[REDACTED] [REDACTED]  
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[REDACTED]  
[REDACTED]

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<sup>67</sup> Cl. Mem., para. 167.

<sup>68</sup> Cl. Mem., paras. 167-168.

<sup>69</sup> Cl. Mem., para. 169, citing Advocate General Yves Bot’s Opinion, *European Commission v. Hungary*, Case C-179/14 (17 September 2015), para. 77 (CL-0012).

<sup>70</sup> Cl. Mem., para. 170, citing Advocate General Yves Bot’s Opinion, *Commission v. Hungary*, , paras. 198, 202, 223 (CL-0012).

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

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[REDACTED]

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<sup>71</sup> Cl. Reply, para. 103, citing Judgment of the Court (Grand Chamber), *Commission v. Hungary* (23 February 2016), paras. 64-67, 107-114, 66-70, 87-88, 91 (CL-0127).

<sup>72</sup> Cl. Reply, para. 104, citing Judgment of the Court (Grand Chamber), *Commission v. Hungary* (23 February 2016), paras. 153-162, 164, 166-172 (CL-0127).

[REDACTED]

**G. SPI's Decision to Close SPH and Leave Hungary**

110. [REDACTED]

[REDACTED]

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<sup>73</sup> Cl. Reply, paras. 106-109.

<sup>74</sup> Cl. Mem., para. 173, citing Report of [REDACTED].

<sup>75</sup> Cl. Mem., para. 173.

<sup>76</sup> Cl. Mem., paras. 173-174, citing Report of [REDACTED].

<sup>77</sup> Cl. Mem., paras. 177-178, citing Report of [REDACTED]; [REDACTED].

<sup>78</sup> Cl. Mem., para. 180, citing Witness Statement of [REDACTED].

<sup>79</sup> Cl. Mem., para. 181, citing Witness Statement of [REDACTED].

[REDACTED]

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<sup>80</sup> Resp. C-Mem., para. 111.

<sup>81</sup> Resp. C-Mem., para. 112.

<sup>82</sup> Cl. Reply, para. 136.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

2. Ordering Hungary to pay compensation for the losses incurred by SPI in an amount provisionally estimated at €80.4 million;
3. Ordering Hungary to bear all the costs and expenses of arbitration, including the fees and expenses of the Arbitral Tribunal and the costs of legal representation;
4. Ordering Hungary to pay interest on any amount awarded to SPI;
5. Granting Claimant any other relief that the Tribunal may deem just and proper.<sup>89</sup>

116. The Claimant also reserved its right to amend or supplement its request for relief during the pendency of the proceeding.<sup>90</sup>

117. In its Reply, the Claimant updated its request for relief in the following way: the losses claimed were provisionally estimated at € 78,249,549.<sup>91</sup> The Claimant continued to reserve its right to amend or supplement its request for relief during the pendency of the proceeding.<sup>92</sup>

118. In its Counter-Memorial, the Respondent requested the Tribunal to:

1. Dismiss all of Claimant's claims under Article 5(2) of the BIT;
2. Award Hungary all of the costs and expenses incurred in these proceedings, including attorneys' fees.<sup>93</sup>

119. The Respondent also reserved its right to amend or supplement its request for relief.<sup>94</sup>

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<sup>89</sup> Cl. Mem., para. 351.

<sup>90</sup> Cl. Mem., para. 351.

<sup>91</sup> Cl. Reply, para. 334. For discussion of the discrepancy between this and Claimant's original claim for damages, see Tribunal analysis *infra*.

<sup>92</sup> Cl. Reply, para. 334.

<sup>93</sup> Resp. C-Mem., para. 257.

<sup>94</sup> Resp. C-Mem., para. 257.



120. In its Rejoinder, the Respondent formulated the same request for relief indicated at paragraph 30 above as well as reserved its right to amend or supplement its request for relief.<sup>95</sup>

#### **IV. JURISDICTIONAL CONSIDERATIONS**

121. For the reasons below, the Tribunal concludes that it possesses jurisdiction to decide the present dispute.

##### **A. ICSID REQUIREMENTS**

122. The conditions for ICSID jurisdiction are stated in Article 25 of the ICSID Convention and in Articles 1 and 9 of the BIT.
123. A legal dispute exists in the sense of Article 25(1) of the ICSID Convention, understood to mean “the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation.”<sup>96</sup>
124. The Claimant argues that the present dispute is over SPI’s legal rights and Hungary’s legal obligations under the BIT and international law, specifically, Hungary’s alleged violations of SPI’s rights and the amount of damages that Hungary owes to SPI as a result.<sup>97</sup>
125. The Respondent does not address this issue in its Counter-Memorial, but indicates in its Reply that “the requirements for ICSID jurisdiction have been met in this case.”<sup>98</sup>
126. The Claimant submits that its dispute is between a Contracting state and a national of another Contracting state within the meaning of Article 25(1) of the ICSID Convention.

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<sup>95</sup> Resp. Rej., paras. 266-267.

<sup>96</sup> *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* (18 March 1965), para. 26 (CL-0028).

<sup>97</sup> Cl. Mem., para. 185.

<sup>98</sup> Cl. Reply, para. 146.

127. Hungary signed the ICSID Convention on 1 October 1986 and deposited its instrument of ratification on 4 February 1987. The ICSID Convention entered into force for Hungary on 6 March 1987. Thus, Hungary is a Contracting state within the meaning of Article 25(1) of the ICSID Convention.
128. SPI is a juridical person incorporated in France and has always had French nationality, including at the time the Parties consented to submit their dispute to ICSID. SPI is registered at the Commercial Registry of Companies of Nanterre under number 350 925 384.<sup>99</sup> France signed the ICSID Convention on 22 December 1965 and deposited its instrument of ratification on 21 August 1967. The ICSID Convention entered into force for France on 20 September 1967. Thus, SPI is a national of another Contracting state for purposes of Article 25(1) of the ICSID Convention.
129. The BIT's definition of "investor" with respect to juridical persons requires that:
- Any body corporate constituted in the territory of either Contracting Party in accordance with its legislation and having its registered office there, or controlled, directly or indirectly, by nationals of one Contracting Party, or by bodies corporate having their registered office in the territory of one Contracting Party and constituted in accordance with that Party's legislation
130. Neither side disputes the existence of an investor, either in pleadings or at the hearing.
131. With respect to whether the dispute "arises directly out of an investment" (jurisdiction *ratione materiae*), the ICSID Convention does not define investment. However, Article 1(1) of the BIT defines the term as follows:

assets such as goods, rights, and interests of every kind, concerning an economic activity in any sector, made after 31 December 1972, in conformity with the legislation of the Contracting Party in the territory or in the maritime area in which the investment is made, and in particular though not exclusively:

(...)

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<sup>99</sup> Cl. Mem., para. 199; SPI Extrait Kbis (Exhibit CEX – 1).

Shares and other forms of participation, including minority or indirect holdings, in companies set up in the territory of either Contracting Party;

Claims to debentures, money or to any performance having an economic value;

d) Copyrights, intellectual property rights, industrial property rights (such as patents, licenses, trademarks, industrial models), technical processes, trade names and goodwill (...).<sup>100</sup>

132. According to the Claimant, its investment fits all three categories above. First, SPI is the sole shareholder of SPH in accordance with Article 1(1)(b). Second, it has claims and rights to performance having an economic value because of the contracts it concluded with employers and merchants for the issuance of vouchers in accordance with Article 1(1)(c). Third, SPI invested in SPH intellectual and industrial property rights, know-how and technology in accordance with Article 1(1)(d). Pursuant to Article 1(1), SPI made its investments after 31 December 1972 in accordance with Hungarian laws.<sup>101</sup>
133. The Claimant also submits that its investment is consistent with the typical characteristics of investments, which are non-mandatory, that some ICSID Tribunals have identified, such as contribution, duration, and risk.<sup>102</sup>
134. The Respondent did not dispute these contentions in its pleadings or at the hearing.
135. Article 25 of the ICSID Convention requires that there be consent in writing to arbitration from both Parties (jurisdiction *ratione voluntatis*). Such consent can be found in Article 9(2) of the BIT which, as discussed below, provides that disputes related to measures of dispossession shall be resolved by ICSID arbitration.

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<sup>100</sup> France-Hungary BIT, Article 1(1), Free English translation of the French original, (CL-0001).

<sup>101</sup> Cl. Mem., para. 189.

<sup>102</sup> Cl. Mem., paras. 191-194.

136. According to Claimant, this Article “embodies Hungary’s standing offer to arbitrate disputes with French investors before ICSID.”<sup>103</sup> Claimant contends that it has met all the requirements of the Article and properly accepted Hungary’s offer. Claimant further contends that its dispute relates to measures of dispossession. Attempts were made to negotiate an amicable settlement with Hungary through a letter dated 31 October 2013, sent to the Hungarian Government to notify it of the dispute and accept Hungary’s offer to arbitrate.<sup>104</sup> Claimant exercised its option to submit the dispute for settlement to ICSID, as the requirement that the state of nationality of the investor and the state Party to the dispute be ICSID Contracting states has been met.<sup>105</sup>
137. The Respondent does not dispute these contentions in its pleadings or at the hearing.

**B. ARTICLE 9 OF THE BIT**

138. Article 9(2) of the BIT gives this Tribunal jurisdiction over claims resulting from Article 5(2). Article 9(2) provides, in relevant part:

2. ... [D]isputes concerning dispossession measures as provided for in article 5, paragraph 2, particularly those relating to compensation, its amount, conditions of payment and interest to be paid in the case of delayed payment, shall be settled under the following conditions:

... When each Contracting Party shall have become party to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, signed at Washington on 18 March 1965, if any such dispute cannot be amicably settled within six months from the time when a claim is made by one of the parties to the dispute, it shall be submitted for arbitration to the International Centre for Settlement of Investment Disputes.<sup>106</sup>

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<sup>103</sup> Cl. Mem., para. 200.

<sup>104</sup> Cl. Mem., para. 201.

<sup>105</sup> Cl. Mem., para. 201.

<sup>106</sup> Décret n° 87-884 du 27 octobre 1987 portant publication de l'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, Paris le 6 novembre 1986 (*Journal officiel* du 31 octobre 1987), p. 123 (RL-0046).

139. Article 9(3) of the BIT specifies that “The arbitral tribunal shall rule in accordance with the provisions of this Agreement and the rules and principles of international law.” Accordingly, in reaching its conclusion that BIT Article 9(2) provides jurisdiction over claims resulting from Article 5(2), the Tribunal has considered the ordinary meaning of the relevant BIT provisions. The Tribunal has also considered that the Parties have arguments based on sources such as treaties between other Contracting States with similar texts, and arbitral decisions interpreting questions similar to those presented in this matter.

## **C. THE CJEU DECISION IN *ACHMEA* AND EC INTERVENTION INTO THIS DISPUTE**

### **(1) Overview**

140. In relation to its jurisdiction to decide this dispute, the Tribunal must consider the impact of the recent decision of the European Court of Justice<sup>107</sup> in *Slovak Republic v. Achmea*, hereinafter referred to as *Achmea*.<sup>108</sup>
141. In this connection, the Tribunal has considered the Parties’ submissions on the matter, including letters from Respondent on 27 March 2018 and from Claimant on 16 April 2018.
142. In passing, the Tribunal notes that even before the *Achmea* decision had been rendered, the Parties’ had exchanged views on the matter, following Respondent’s letter of 14 April 2017 notifying the Tribunal that the impact of the TFEU had been referred to the CJEU. The import of that reference was also discussed in oral exchanges between counsel and the Tribunal in Washington, as recorded in the Transcript for Day 1 of the hearings for 5 May 2017.

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<sup>107</sup> The Tribunal has noted a variance in citation to *Achmea*, sometimes with reference to ECJ (European Court of Justice), sometimes CJEU (Court of Justice of European Union). Our understanding is that the CJEU is a judicial institution seated in Luxembourg comprised of two different courts, the Court of Justice (with one judge from each EU country) which addresses *inter alia* requests for rulings from national courts, and the General Court, which rules on actions for annulment brought by individuals and companies.

<sup>108</sup> *Slovak Republic v. Achmea B.V.*, European Court of Justice (Grand Chamber) (Court of Justice of the European Union), 6 March 2018.

143. The Tribunal has also considered the Opinion of Advocate General Wathelet filed with the CJEU on 19 September 2017, addressing the effect of the Treaty on the Functioning of the European Union (TFEU) as it may affect this arbitration.
144. The Tribunal has also considered the European Commission’s (EC’s) *Amicus Curiae* brief in this matter, dated 14 September 2018, and the Parties’ responses, including letters from Claimant and Respondent on 28 September 2018.

**(2) The *Achmea* Decision**

145. In *Achmea*, the underlying dispute arose from an investment in Slovakia by a Dutch insurance group. The Dutch claimant had challenged the reversal of certain measures to liberalize the health insurance market in the Slovak Republic. The challenge was brought pursuant to Article 8 of the 1992 Bilateral Investment Treaty between the Netherlands and Czechoslovakia (as it then was).
146. As permitted under the relevant BIT, the Dutch claimant, *Achmea*, opted for arbitration pursuant to the UNCITRAL Rules, before an arbitral tribunal seated in Frankfurt. An award of €22 million in favor of *Achmea* was challenged in an unsuccessful annulment action before a court in Frankfurt, with appeal to the German BGH (Bundesgerichtshof).
147. The host state, Slovakia, contended that the arbitration provisions of the BIT were incompatible with certain provisions of the TFEU.
148. The arbitral tribunal did not purport to apply European Union Law. Nevertheless, the BGH made a reference to the CJEU for an opinion on whether the BIT was incompatible with EU law.
149. In its decision, the CJEU addressed the effect of two provisions in the TFEU: (i) Article 344, which provides that EU member states “undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein,” and (ii) Article 267, providing *inter alia* that the CJEU “shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.”<sup>109</sup>

150. The CJEU rendered a ruling whose conclusion reads as follows in the English text<sup>110</sup>:

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.

151. The Tribunal notes that the French text of that decision reads with greater flexibility and nuance. The English employs the verb “to preclude” which might imply that the TFEU imposes some supervening illegality that renders investor-state arbitration *per se* invalid. The French text reads, “Les articles 267 et 344 TFUE doivent être interprétés en ce sens qu’ils s’opposent à une disposition [aux termes de laquelle un investisseur peut] introduire une procédure ...devant un tribunal arbitral.” In using the verb *s’opposer* the French text carries a notion of tension as between the TFEU and BIT arbitration, rather than some supervening illegality.

### **(3) The Parties’ Positions on *Achmea***

152. Respondent argues that the *Achmea* Decision has a general reach and applies to the France-Hungary BIT, and to these proceedings.

153. According to Respondent, the CJEU established the incompatibility of Articles 267 and 344 TFEU with any international agreement concluded between Member States under

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<sup>109</sup> In light of its rulings on Articles 267 and 344, the ECJ found it unnecessary to answer a third question referred by the German BGH, related to Article 18 of the TFEU, which provides “Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.”

<sup>110</sup> In light of its views on Articles 267 and 344, the CJEU did not consider it necessary to reach the discrimination provisions of Article 18 of the TFEU.

which an investor from one Member State may bring proceedings against another Member State before an arbitral tribunal concerning an investment in the latter Member State.

154. Respondent does not consider the CJEU finding confined to the specific treaty considered in that case. Respondent also contended, *inter alia*, that the CJEU reasoning remains persuasive and applicable to an ICSID case, with effect *erga omnes* to deprive the current Tribunal of jurisdiction.
155. In the alternative, should the Tribunal take the view that it possesses jurisdiction, Respondent argues that the Tribunal should decline to issue a ruling on the merits on this case.
156. In this context, Respondent cites Judge Rosalyn Higgins in the Legality of the Use of Force case (*Serbia and Montenegro v. Germany*).<sup>111</sup> That Opinion speaks of the right of a court not to exercise a jurisdiction it has.
157. Respondent contends that a compelling reason not to exercise jurisdiction includes the prevention of fragmentation of international law resulting from “the proliferation of international *fora* and/or the issuance of conflicting decisions and unenforceable awards.”
158. In contrast, Claimant argues *inter alia* that the Tribunal’s jurisdiction derives *not* from EU law, but from Article 25 of the ICSID Convention and the France-Hungary BIT. According to Claimant, Respondent is estopped from arguing differently.
159. Claimant further contends that the Tribunal’s jurisdiction is not impacted by the *Achmea* Decision because the CJEU simply referred to a provision of the Netherlands-Slovakia BIT which required application of Slovakian law. In that respect, the CJEU found that the arbitrators in that case may have to interpret and apply EU law as a part of Slovakian law.
160. More specifically, argues Claimant, the CJEU reasoning rested on Article 8 of the Netherlands-Slovakia BIT, which was found to be precluded by Articles 267 and 344 of

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<sup>111</sup> *Serbia and Montenegro v. Germany*, Judgment, I.C.J. Reports (2004), Separate Opinion of Judge Higgins, at paras 10-11.



the TFEU, establishing a preliminary ruling procedure on interpretation and application of EU law. That finding does not bar this present tribunal from exercising jurisdiction, as it is not asked to decide whether Hungary's conduct breached EU law in any way.

**(4) European Commission Intervention**

161. The European Commission (EC) submitted an *Amicus Curiae* Brief to the Tribunal dated 14 September 2018.
162. The EC argued that the Tribunal lacks jurisdiction over the dispute in light of the *Achmea* decision. In brief, the EC argued that the *Achmea* judgment applies to the French-Hungarian BIT. European Union (EU) law, in its view, thus prevails over Article 9(2) of the French-Hungarian BIT because of the general principle of the primacy of European Union (EU) law in the event of a conflict of laws.<sup>112</sup> Article 9(2) of the BIT contains the offer to arbitrate in the case of dispute, referenced above in Section IV.B. of this Award. The EC argues that Article 9(2) became invalid when Hungary joined the EU in 2004.
163. Furthermore, the EC argues, the conflict rules in the Vienna Convention on the Law of Treaties (VCLT), particularly the principle of posteriority in Article 30(3) of the VCLT, support the primacy of EU law over Article 9(2) of the BIT.<sup>113</sup>
164. Article 30(3) of the VCLT provides that when all parties to an earlier treaty are also parties to a later treaty, but the earlier treaty is not terminated or suspended under Article 59 of the VCLT, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.
165. Thus, in the EC's view, the Tribunal lacks jurisdiction over the dispute because Hungary has not consented in a valid manner to the arbitration. Hungary's consent to arbitration became invalid when Hungary joined the EU.

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<sup>112</sup> EC *Amicus Curie* Brief, paras. 20-26.

<sup>113</sup> *Id.* at paras. 28-39.

166. The Tribunal notes that the EC’s *Amicus* Brief also makes reference to Article 14 of the BIT. However, the BIT contains no Article 14.
167. Finally, the EC argues that *Achmea*’s reasoning that intra-EU investment arbitration is incompatible with EU law is applicable to ICSID arbitrations, even though *Achmea* itself concerned an UNCITRAL arbitration.<sup>114</sup> UNCITRAL disputes only partially remove such control by a Member State’s judge. The EC argues that the ICSID system precludes review of an award by a national judge of a Member State, thus forestalling any possibility that a judge of a Member State’s court could control the substance of an ICSID Award. Thus, *Achmea*’s reasoning logically applies to invalidate ICSID arbitrations, which exclude Member States’ courts to a greater degree than UNCITRAL proceedings.
168. The EC also argues that the “sunset clause” in Article 12 of the BIT is also invalid because it seeks to prolong the applicability of the offer for arbitration in Article 9(2).<sup>115</sup>
169. The EC further argues that any award in this dispute would be unenforceable since the award would be based on an invalid consent to arbitration, and therefore domestic tribunals of Member States would be required to refuse recognition and enforcement.<sup>116</sup>
170. In its letter of 28 September 2018, Respondent substantially echoes the EC’s argument that EU law prevails over Articles 9(2), 9(3), and 12 of the BIT, and that application of the VCLT further supports *Achmea*’s reasoning in this regard.<sup>117</sup> Respondent notes that it has consistently argued that the Tribunal lacks jurisdiction in this dispute for this reason.<sup>118</sup> Respondent argues that the Tribunal should decline issuing a decision on the merits in the instant dispute for these reasons, and to prevent the fragmentation of international law.<sup>119</sup>

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<sup>114</sup> *Id.* at paras. 13-19.

<sup>115</sup> *Id.* at para. 17.

<sup>116</sup> *Id.* at para. 43.

<sup>117</sup> Respondent’s Letter of 28 September 2018.

<sup>118</sup> *Id.*, at p. 1.

<sup>119</sup> *Id.* at p. 9.

171. In its comments of 28 September 2018, Claimant argues that EU law is irrelevant to the Tribunal's determination of jurisdiction, which stems from the ICSID Convention and the BIT. The *Achmea* decision, in Claimant's view, is restricted to provisions like those under the Netherlands-Slovakia BIT at issue in *Achmea*, and therefore does not apply to the France-Hungary BIT.<sup>120</sup>
172. Claimant further argues that *Achmea* has no automatic legal effect, as evidenced by the fact that the Commission itself has asked certain Member States—but not Hungary—to terminate their intra-EU BITs.<sup>121</sup> Other tribunals have been debating the applicability of *Achmea* to other intra-EU BITs, revealing that its applicability is far from automatic.
173. Further, Claimant argues that EU law does not apply to the merits of this arbitration. Claimant cites Respondent's argument that the CJEU's C-179/14 judgment against Hungary is irrelevant in this dispute because CJEU and ICSID Proceedings are fundamentally different.<sup>122</sup> In this context, and given exchanges on the matter implicating Parties, Claimant argues that the Parties have agreed to exclude EU law from the ambit of law applicable to this dispute.<sup>123</sup>
174. Claimant further argues that, by extending *Achmea*'s reasoning to ICSID arbitrations, the EC ignores the premise that arbitration is generally immune from Court review.<sup>124</sup> Moreover, *Achmea*'s primary concern was with cases where a tribunal is asked to interpret or apply EU law. As this Tribunal is not required to interpret or apply EU or Hungarian law, and no danger exists that the Tribunal may render an award that threatens the consistent and uniform application of EU law, *Achmea* is inapplicable here.<sup>125</sup>

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<sup>120</sup> Claimant's Letter of 28 September 2018, paras. 3-5.

<sup>121</sup> Claimant's Letter of 28 September 2018, paras. 7-10.

<sup>122</sup> *Id.* at para. 26.

<sup>123</sup> *Id.* at para. 28.

<sup>124</sup> *Id.* at para. 30.

<sup>125</sup> *Id.* at para. 31.

175. Moreover, Claimant argues that the EC’s conflicts analysis is flawed. The TFEU and the France-Hungary BIT do not share the same subject matter, as required for application of the VCLT’s provisions 59 and 30 on conflicts.<sup>126</sup> Therefore, Claimant argues, neither the EU’s conflict rules nor the VCLT apply in this arbitration.
176. Moreover, Claimant argues that the EC did not identify any rule providing for the primacy of EU law over an international treaty.<sup>127</sup>
177. Claimant argues that no risk of the fragmentation of international law exists in this case because no forum with competing jurisdiction to this Tribunal may render a conflicting decision.<sup>128</sup> The France-Hungary BIT and the EU dispute mechanisms operate in their own spheres without conflict, according to Claimant.<sup>129</sup>

#### **(5) Tribunal Analysis**

178. The EC’s intervention in this case stems from its interpretation of the *Achmea* judgment. The Tribunal thus addresses *Achmea* here.
179. As noted above, the *Achmea* decision involved a reference to the CJEU in respect of intra-European Union bilateral investment treaties, as related to the compatibility of those treaties with Articles 18, 267 and 344 of the Treaty on the Functioning of the European Union (“TFEU”), although in the end the CJEU rested its decision only on Articles 267 and 344.
180. In relevant part, those provisions provide as follows.
- (a) The first paragraph of Article 18 TFEU states that “within the scope of application of the Treaties, and without prejudice to any special provisions contained, any discrimination on grounds of nationality shall be prohibited.”

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<sup>126</sup> *Id.* at para. 38-42.

<sup>127</sup> *Id.* at paras. 52-56.

<sup>128</sup> *Id.* at para. 46.

<sup>129</sup> *Id.* at para. 50.

(b) The first to third paragraphs of Article 267 TFEU provide:

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

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

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

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

- (c) Article 344 TFEU provides that “Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.”

- 181. As an initial matter, the Tribunal notes that this present dispute does not involve the application of the law of any EU state, or the law of the EU as such.
- 182. Article 9(3) of the relevant France-Hungary BIT specifies that “The arbitral tribunal shall rule in accordance with the provisions of this Agreement and the rules and principles of international law.” This provision remains highly significant, particularly in light of other treaties with contrasting applicable law provisions. Article 8(6) of the Netherlands-Slovakia BIT, relevant in *Achmea*, provides that the arbitral tribunal shall take into account *inter alia* “the law in force of the Contracting Party concerned” which of course would be the law of an EU member state.
- 183. In addressing “international law” the Tribunal considered the ordinary meaning of the treaty provisions and other applicable interpretative sources as permitted by Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties, with recourse to supplementary means of interpretation only when the ordinary meaning would otherwise

be ambiguous or obscure, or would lead to a result which is manifestly absurd or unreasonable.

184. Thus, the Tribunal would not apply either Hungarian or EU law.
185. The Tribunal further observes that by its terms the CJEU ruling appears to bind not this Arbitral Tribunal, but rather the EU state court in Germany that referred the matter to the CJEU for a ruling. Although scholarly opinion may be divided on the *erga omnes* effects within the EU of a CJEU judgment, at most those effects would concern EU member state courts, not an ICSID tribunal whose authority rests on an international treaty such as the ICSID Convention.
186. Unlike the arbitral tribunal in *Achmea*, this Tribunal's authority derives from the self-contained system of the ICSID Convention. This Tribunal's decisions do not risk annulment proceedings in any of the EU member states, at least not pursuant to grounds traditionally considered legitimate under national law.
187. By contrast, *Achmea* concerned an *ad hoc* arbitration tribunal subject to the law of Germany, an EU member.
188. In the present case, the Tribunal must decide on Hungary's alleged liability on the basis of the BIT itself and international law, not EU law or the law of an EU state. No allegation has been made that EU law has been violated or that the controverted measures in question run contrary to EU law. Indeed, neither side in the present case has argued for the application of either Hungarian or EU law to the underlying dispute.
189. In this connection, the Tribunal sees no reason to find an impairment of its jurisdiction by reason of the *Achmea* decision. The CJEU in *Achmea* ruled with respect to a treaty that required application of Slovakian law, as to which the tribunal in that case might need to interpret EU legal principles. In that context, Article 8 of the Netherlands-Slovakia BIT was precluded by Articles 267 and 344 of the TFEU which establish a preliminary ruling procedure" by which parties undertake not to submit disputes about the interpretation and application of EU law to methods of dispute settlements outside of the EU Treaties.

190. In the present arbitration, no such reasoning bars the arbitral tribunal from exercising jurisdiction. No risk exists of substantive legal fragmentation with respect to international tribunals or courts of competing jurisdiction.
191. The Tribunal in this present case is not asked to decide whether Hungary's conduct breached EU law. The CJEU infringement procedure against Hungary, referred to above, has been discussed as a factual circumstance, not in support of applicability of EU law to the present dispute. Moreover, proceedings before the CJEU and ICSID tribunals are fundamentally different. Principles of comity and judicial propriety do not require any tribunal to decline jurisdiction in favor of another.
192. No conflict exists between the TFEU and the BIT that would negate the jurisdiction of this Tribunal. The TFEU and the France-Hungary BIT do not share the same subject matter, as required for application of the VCLT's provisions 59 and 30 on conflicts. Thus, neither the TFEU's nor the VCLT's provisions on conflict of laws apply in this arbitration.
193. For the reasons stated above, after having carefully considered the ECJ decision in *Achmea*, the EC Intervention, and Claimant's and Respondent's related submissions, the Tribunal concludes that the decision has no preclusive effect such as to remove its jurisdiction over the present dispute.

**D. TREATY INTERPRETATION**

194. Article 32 of the 1969 Vienna Convention on the Law of Treaties ("Vienna Convention"), permits recourse to supplementary means of interpretation such as these, but only to confirm the meaning resulting from the application of Article 31 [of the Convention], or to determine the meaning when the interpretation according to Article 31:
- (a) leaves the meaning ambiguous or obscure; or
  - (b) leads to a result which is manifestly absurd or unreasonable.

195. Article 31(1) requires that a treaty “. . . be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”
196. In this connection, the Tribunal has considered the Parties’ arguments based on multiple decisions of national or international tribunals, not as binding precedent, but for the purpose of promoting consistent interpretation of comparable treaty language and similar fact patterns. The Tribunal has taken special note of prior decisions or awards that were cited by the Parties in their submissions.
197. In relation to the BIT, the Tribunal has considered several key matters, including the object of the expropriation, the occurrence of the expropriation, the distinction between an expropriation and a *bona fide* regulatory measure, and the lawfulness of the expropriation.

## **V. OBJECT OF EXPROPRIATION**

### **A. NATURE OF INVESTMENT**

#### **(1) The Treaty Terms**

198. The definition of “investment” in the France-Hungary BIT provides as follows:<sup>130</sup>

Article 1. Pour l'application du présent Accord:

1. Le terme : « investissement » désigne des actifs tels que les biens, droits et intérêts de toutes natures, liés à une activité économique dans quelque secteur que ce soit ... et plus particulièrement, mais non exclusivement:

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b) Les actions et autres formes de participation même minoritaires ou indirectes, aux sociétés constituées sur le territoire de l'une des Parties;

The English translation taken from the UN Treaty Series reads as follows:

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<sup>130</sup> Décret n° 87-884 du 27 octobre 1987 portant publication de l'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, Paris le 6 novembre 1986 (*Journal officiel* du 31 octobre 1987) (CLA-0001).



Article 1. For the purposes of this Agreement:

The term “investment” shall apply to assets such as property, rights, and any type of interests of any category, related to an 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;<sup>131</sup>

**(2) Summary of Parties’ Positions**

199. According to Claimant, SPI’s shareholding in SPH constitutes the object of the expropriation,<sup>132</sup> Hungary’s tax measures destroyed SPH’s ability to generate profit and thereby stripped the shareholdings of value, tantamount to seizure of those shareholdings, indirectly transferring much of the value of those shareholdings to the state.
200. Claimant further contends that goodwill, know-how, customers, market access, and market share are part of SPI’s investment, contribute to the value of covered shareholdings, and are recognized as property rights related to the underlying investment that are capable of being expropriated.<sup>133</sup>
201. SPH was still in operation at the time the case was filed, with Claimant retaining control of its shares. Claimant contends, however, that control of the shares is irrelevant to the fact of its dispossession. Claimant further asserts that the BIT does not impose any durational

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<sup>131</sup> RL-0046. The Tribunal notes that Claimant appears to have used a slightly different translation. CL-0001, cited in Claimant’s Memorial on the Merits at para. 187.), reads to cover “. . . assets such as goods, rights, and interests of every kind, concerning an economic activity in any sector, made after 31 December 1972, in conformity with the legislation of the Contracting Party in the territory or in the maritime area in which the investment is made, and in particular though not exclusively: (...) b) Shares and other forms of participation, including minority or indirect holdings, in companies set up in the territory of either Contracting Party;” This translation does not have variations that are significant for the Tribunal’s analysis. The Tribunal notes that Claimant does not seem to have submitted any translation into English as CL-0001, but instead submitted the French version of the BIT as document CLA-0001.

<sup>132</sup> Cl. PHB, para. 2.

<sup>133</sup> Cl. PHB, para. 3.

requirement on a dispossession. Dispossession must be more than temporary or ephemeral, but need not continue indefinitely.<sup>134</sup>

202. Respondent admits that Claimant's shareholding constitutes a right capable of expropriation, but argues that there has not been a taking of the shares nor of any rights associated with those shares.<sup>135</sup> Respondent notes that Claimant still has title, ownership, and control of the shareholdings, and possession of assets; and that SPH is still in operation.
203. According to Respondent, Claimant complains only about a reduction in the value of SPI's shares in SPH.<sup>136</sup> Since the Claimant had no right to market share, market position, customers, or the preferential tax regime it previously enjoyed, Respondent argues that Claimant has no legal rights capable of expropriation.
204. Respondent further asserts that, to establish an expropriation claim, Claimant must show that its deprivation is permanent.<sup>137</sup> According to Respondent, the BIT's very choice of the term "dispossession" was meant to narrow the scope of expropriation that is actionable under the BIT. For Respondent, the BIT requires the impact of dispossession to be irreversible, persistent, or irreparable.<sup>138</sup> The clause's purpose, says Respondent, was to assimilate protections for indirect expropriations to those for direct expropriations, with a need for permanence in dispossession.<sup>139</sup>

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<sup>134</sup> Cl. PHB, para. 10.

<sup>135</sup> Resp. PHB, para.18.

<sup>136</sup> Resp. PHB, para. 19.

<sup>137</sup> Resp. PHB, para. 43.

<sup>138</sup> Resp. PHB, para. 44.

<sup>139</sup> Resp. PHB, para. 44, citing see, e.g., *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability (30 July 2010), para.134 (holding that dispossession requires substantial deprivation of the investment, which must be permanent with lasting results) (RL-0041); see also *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability (27 December 2010), para. 196 (holding that dispossession requires total deprivation of the investment's value or total loss of control by the investor of its investment, both of a permanent nature) (RL-0045); see also *Les Laboratoires Serviers, S.A.S., Biofarma, S.A.S., Arts et Techniques du Progres S.A.S. v. Republic of Poland*, UNCITRAL, Award (14 February 2012), para. 577 (although dispossession must not be permanent in the sense of continuing ad infinitum, the deprivation must possess a more than transitory character) (CL-0055).

**B. PROPERTY INTEREST CAPABLE OF BEING DISPOSSESSED OR EXPROPRIATED**

205. The Majority of the Tribunal has been persuaded that Claimant possessed a property interest constituted by its shareholdings, and that this property interest existed independently of the favorable tax regime. The value of those shareholdings was taken by state action and transferred to state-controlled entities.
206. As an initial matter, the Majority notes that the Parties sometimes seem to use the terms “dispossession” and “expropriation” interchangeably. The separate and dissenting opinion of Mr. Thomas distinguishes between the two notions. By contrast, while not denying that in some instances differences may exist, the Majority does not rest its decision on any operative distinction between the two words, as relevant to findings on liability or damages.
207. Regardless of the reason for Claimant’s investment (whether tax motivated or not), the investment once made became capable of expropriation.
208. The Majority of the Tribunal considers the existence of the SPH shares as sufficient for an expropriation claim. No additional vested property right is required. For the Majority, the taking of shares suffices to trigger an expropriation claim.
209. No vested property or contractual rights, in addition to shares, would normally be required to constitute an expropriation. In his connection, the Third Restatement of the Foreign Relations Law of the United States 1987, Sect. 712, states at comment g: “A state is responsible as for an expropriation of property under subsection (1) when it subjects alien property to taxation, regulation or other action [...] that prevents, unreasonably interferes with, or unduly delays, effective enjoyment of an alien’s property”.
210. In passing, it may be noted that besides *Edenred v. Hungary*, and *UP v. Hungary*, no other arbitral tribunal has had occasion to examine the exact legal issues in the instant arbitration.
211. The Majority considers that the facts in the present dispute are distinguishable from cases relied on by Respondent suggesting that a vested property right, independent of shares, must exist to create an expropriation claim. None of the precedents relied upon by

Respondent requires the existence of vested property interests in addition to shareholding rights of the expropriated enterprise.

212. In cases which rejected claims of indirect expropriation, the non-existence of contractual or other vested rights (besides shareholdings) was not the decisive argument.<sup>140</sup>
213. The Majority of the Tribunal considers as particularly misplaced Respondent's reference to *Emmis v. Hungary*,<sup>141</sup> on which the separate and dissenting opinion also relies. Respondent has cited the case for the proposition that the claimant must have a vested property right or asset in order to justify a claim of indirect expropriation.<sup>142</sup> *Emmis v. Hungary* concerned a national FM-radio frequency broadcasting license which allegedly constituted rights under Hungarian property law created by a broadcasting agreement. In *Emmis v. Hungary*, the action was brought to protect contract rights, not to seek compensation for shareholding interests as such. By contrast, the present arbitration implicates claims related to the taking of shares.
214. The contractual rights at stake in *Emmis v. Hungary* did not exist at the time relevant to the claim.<sup>143</sup> At the time in question, all that the claimants had was an invitation to tender for a possible renewal of the license.<sup>144</sup> The measures taken by the state affected rights that had already expired. Even if the value of the property was greatly diminished, the acts of the state could not cause such effect as they did not affect rights that were in force at the time the measures were taken.

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<sup>140</sup> See, e.g., decisions in *Feldman v. Mexico*, *Encana v. Ecuador*, and *Emmis v. Hungary*, cited *infra*.

<sup>141</sup> *Emmis International Holding, B.V. (Dutch), Emmis Radio Operating, B.V. (Dutch), MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. V. Hungary*, ICSID Case No. 12/2.

<sup>142</sup> *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, ICSID Case No. ARB/12/2, Award (16 April 2014) (RL-0012).

<sup>143</sup> Ultimately, the expropriation claim in *Emmis* failed because the contractual rights did not exist at the time relevant to the claim. *Id.*, at paras. 213, 221.

<sup>144</sup> *Id.*, at paras. 213, 221.

215. Unlike in *Emmis v. Hungary*, in the instant arbitration, SPI owned shareholdings in SPH at the time of the PIT reforms and the alleged expropriation. The facts of *Emmis v. Hungary* are thus sufficiently distinct from the instant case that it is not applicable here.
216. Respondent's reliance on *Merrill Ring v. Canada*<sup>145</sup> is also misplaced. *Merrill Ring v. Canada* actually supports Claimant's position by confirming that covered investments are capable of being expropriated, and that the loss of value of covered investments can result in an expropriation. In *Merrill Ring v. Canada*, the tribunal dismissed the expropriation claim, as it disagreed with claimant's allegation that its "interest in realizing fair market value for its logs on the international market" was protected under NAFTA as a standalone right. While the tribunal held that claimant did not have a right to export at a certain price, it expressly noted that claimant's right to access the international market is a property interest subject to NAFTA protection.<sup>146</sup> The tribunal went on to reason that, had claimant's business been operating at a loss as a result of the measures, an expropriation could have been found because its value would have been "seriously compromised."<sup>147</sup> In the present case, the value of Claimant's shareholdings was reduced nearly to zero by the challenged measures. It could no longer access the voucher market in which it was a dominant player until the challenged reforms. Thus, *Merrill Ring v. Canada* is distinguishable from the instant case in its finding that an expropriation did not occur, but its reasoning actually supports Claimant's position.
217. *Feldman v. Mexico*<sup>148</sup> is also distinguishable from the present case. In *Feldman v. Mexico*, claimant was a registered export company that alleged that its Mexican subsidiary had a right to export cigarettes. It argued that its investment was appropriated when respondent refused to rebate excise taxes applied to cigarette exports. The tribunal rejected the expropriation claim for three main reasons: 1) international law does not require states to

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<sup>145</sup> *Merrill & Ring Forestry L.P. v. Canada*, UNCITRAL, ICSID Administered Case, Award (31 March 2010), paras. 140 and 144 (RL-0023).

<sup>146</sup> *Id.* at para. 143.

<sup>147</sup> *Id.* at para. 148.

<sup>148</sup> *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award (16 December 2002), paras. 1, 119 (RL-0015).

permit “grey market” exports of cigarettes; 2) claimant’s investment was not completely destroyed, and claimant was able to continue several other lines of business in Mexico, and 3) the State’s measures were based on objective, justifiable reasons, and the most unfavorable conditions of them had been in force for the entire duration of the investment and were not new.

218. Unlike in *Feldman v. Mexico*, the object of Hungary’s expropriation is not an abstract right. The object of the expropriation was Claimant’s shareholdings, which do not require an additional vested right to ground an expropriation claim. Moreover, the challenged measures were not *bona fide*, as discussed below. Also, in *Feldman v. Mexico*, the claimant’s argument was based on an alleged change in the tax law, which had actually been unchanged for the entire duration of the investment. The meal voucher industry at issue in the instant case is not comparable to “grey market activity” like the cigarette export industry.<sup>149</sup> Thus, *Feldman v. Mexico* is distinguishable from the instant case.
219. The Tribunal does not understand Claimant to assert a vested right to the continuation of a preferential tax framework in itself. It is undisputed that Claimant had no vested right to the continuance of the legal regime it had enjoyed for many years. However, the change, in combination with other measures taken by the state and discussed below, had the effect of destroying the value of the Claimant’s shares in SPI Hungary—in which it did have a vested right—and of transferring the Claimant’s market share to entities in which the state had a financial interest.
220. Respondent has noted that Claimant’s argument about the nature of its investment in Hungary has changed over the course of the proceedings. This may be so.
221. At this point, however, the Tribunal must address whether there exists an object capable of expropriation, given the arguments that have ultimately been made by both sides.

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<sup>149</sup> See *Commission v. Hungary*, C-179/14, Judgment of the Court (Grand Chamber) (23 February 2016), para. 168 (CL-0127) (rejecting Hungary’s reliance on EU cases involving gray market activities because meal voucher policy objectives were not comparable to such cases).

**C. TRIBUNAL ANALYSIS AND CONCLUSION**

222. The Majority of the Tribunal finds that Claimant SPI made an investment in Hungary through its shareholdings, which were the object of the expropriation. Thus, at the time of the alleged expropriation, Claimant owned an investment protected under the BIT.
223. In this connection, the Tribunal notes that Article 1(b) of the BIT defines “investment” to include, “particularly but not exclusively,” shares and any other forms of participation: “les actions et autres formes de participation” in the French original.
224. It is undisputed that SPI, at the time of the alleged expropriation, owned 100% of the shares in SPH, the relevant Hungarian entity, which constituted an investment under the BIT.
225. The above-mentioned definition of investment contained in the BIT determines the scope of protection and applies both to whether the Tribunal has jurisdiction to decide on a claim of expropriation and to the substantive protection under the BIT, i.e., whether the rights covered by the definition are capable of expropriation. If shareholding rights are sufficient for the purpose of establishing the existence of an investment and the jurisdiction of the Tribunal, the same rights are also sufficient for the purpose of establishing a breach of the substantive standards of protection, including expropriation.
226. Shareholding rights can be the object of direct expropriation, as would be the case in the event of direct transfer of title over the shares, or of indirect expropriation, as in the event of loss of value that effectively neutralizes the investment. If shares are property that can be directly expropriated, it follows that they can also be indirectly expropriated.
227. Suppose the Tribunal found that Claimant’s shareholdings were not a property right or investment capable of expropriation. The logical consequence of this would be that the BIT does not protect shareholdings from expropriation. This would discourage investors from investing via shareholdings in a state, which would undermine the purpose of the France-Hungary BIT and similar BITs.
228. Thus, the Majority of the Tribunal concludes that Claimant’s shareholdings were the object of the expropriation in the instant case.

## **VI. OCCURRENCE OF EXPROPRIATION**

229. The Tribunal must first determine whether an expropriation occurred.

230. In their post-hearing briefs, the Parties agreed that Claimant did not make any claim for a direct expropriation.<sup>150</sup> The Tribunal must, therefore, define “indirect expropriation” in order to determine whether one occurred. The BIT provides no such definition.

### **A. INDIRECT EXPROPRIATION**

231. The Tribunal will apply the definition of indirect expropriation that it proposed to the Parties, and to which they agreed in their post-hearing briefs:<sup>151</sup>

A measure or series of measures that has an effect equivalent to direct expropriation in that it substantially deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy, and dispose of its investment, without formal transfer of title or outright seizure.

232. At times, Claimant’s submissions suggest that Respondent committed a “creeping expropriation” or an “indirect creeping expropriation.”<sup>152</sup>

233. Claimant and Respondent do not differ substantially on the meaning of those expressions, having agreed to the above-cited definition of “indirect expropriation” in their post-hearing briefs. Both sides thus seem to agree that creeping expropriation represents a type of indirect expropriation that occurs through a series of cumulative actions rather than a single measure.<sup>153</sup> Claimant’s definition of indirect expropriation includes dispossession through

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<sup>150</sup> Cl. PHB, para. 9; Resp. PHB, para. 42.

<sup>151</sup> Cl. PHB, para. 12; Resp. PHB, para. 48.

<sup>152</sup> See, e.g., Cl. PHB, para. 4 (“creeping expropriation”); Cl. PHB, p. 20 (“A. Hungary’s [*sic*] Mischaracterizes SPI’s Claim of Indirect Creeping Expropriation”).

<sup>153</sup> Cl. PHB, para. 11, citing C.H. Schreuer, *The Concept of Expropriation under the ETC and other Investment Protection Treaties*, transnational Dispute Management (Nov. 2005), Vol. 2 Issue 5, paras. 35-36 (CL-0053); Resp. PHB, para. 45.



a series of actions, “none of which might qualify as an expropriation by itself, but the aggregate effect of which is to destroy the value of the investment.”<sup>154</sup>

**(1) Series of Measures Leading to Expropriation**

234. The Majority of the Tribunal accepts Claimant’s argument that the PIT changes, tax advantages to the SZÉP Cards through PIT and SZÉP Decree, and tax advantages to the Erzsébet Vouchers through the PIT, Erzsébet Decree, and Erzsébet Act constituted a series of acts leading to an indirect expropriation.<sup>155</sup>
235. Claimant further argues that these measures were part of an even greater set of actions, including due process violations, implementation of a media campaign from state funds, reneged representations by Hungarian negotiators, and continuing tax reforms in 2013. Claimant argues that all of these actions had abusive intent, no proven public purpose, and collectively led to the destruction of its investment.<sup>156</sup> As discussed below, the Majority of the Tribunal agrees with Claimant that some of these actions contributed to the indirect expropriation.
236. The Respondent argues that changes in the vouchers’ tax advantage cannot give rise to liability under the BIT when the changes were justifiable. Respondent argues that the tax changes were justifiable to promote a public purpose.<sup>157</sup> The Tribunal will discuss Respondent’s public purpose argument below.

**(2) Substantial Deprivation**

237. On balance, the majority of the Tribunal finds that changes to the tax regime substantially deprived Claimant of the fundamental attributes of property in its investment, including the right to use and enjoy its investment. The PIT changes decreased the value of Claimant’s

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<sup>154</sup> Cl. PHB, para. 11, citing Schreuer.

<sup>155</sup> Cl. PHB, para. 14.

<sup>156</sup> Cl. PHB, para. 14.

<sup>157</sup> Resp. PHB, para. 61.

investment to nearly zero and resulted in the previous value of Claimant's investment being transferred indirectly to the state. In this respect, the present case can be distinguished from *El Paso v. Argentina*.<sup>158</sup>

238. Respondent cited *El Paso v. Argentina* to support its assertion that an indirect expropriation did not occur because Claimant remains in control of its investment. However, *El Paso v. Argentina* is distinct from the current arbitration.
239. In *El Paso v. Argentina*, claimant sold its investment in Argentinian companies, claiming that Argentina's measures during a financial crisis had destroyed the value of its investment and caused its lack of business prospects. Argentina argued that claimant El Paso sold its investment to concentrate on business elsewhere, not because of Argentina's financial measures.
240. First, *El Paso v. Argentina* confirms that the investor's shareholding rights can be the object of indirect expropriation regardless of the existence of ownership or contractual rights of the locally incorporated subsidiary. The tribunal declined jurisdiction over claims based on alleged breaches of the rights of the locally incorporated subsidiaries, which did not qualify as protected investments. It also noted that El Paso had not entered into any investment agreement with the state.<sup>159</sup>
241. The tribunal then analyzed El Paso's indirect expropriation claim with reference to El Paso's shares in the locally incorporated subsidiaries. El Paso's expropriation claim failed because the tribunal found that the claimant's sale of its shares in the subsidiaries was part of a global worldwide divestment strategy, and not a direct and unavoidable consequence of the measures taken by Argentina.<sup>160</sup> The tribunal rejected the claim on its merits, but did

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<sup>158</sup> *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award (31 October 2011) (RL-0011).

<sup>159</sup> *Id.*, at paras. 198 and 267.

<sup>160</sup> *Id.*, at paras. 277-299.

not question that shares can be the object of indirect expropriation to the extent the state's conduct results in the neutralization of the property rights of the investor.<sup>161</sup>

242. The *El Paso v. Argentina* tribunal concluded that Argentina's tax measures did not constitute an indirect expropriation because they were reasonable and that their impact on the claimant had not been so severe as to "result in the neutralization of the property rights of the Claimant."<sup>162</sup>
243. While *El Paso v. Argentina* bears similarities to the instant case because it involved an alleged indirect expropriation of Claimant's shareholdings, the facts of *El Paso v. Argentina* are distinct from those in *SPI v. Hungary*. Unlike in *El Paso v. Argentina*, where significant evidence existed that Claimant intended to sell its shares as part of a broader business strategy, a direct and unavoidable causal link exists between the PIT reforms and the loss of the value of Claimant's investment, and also Claimant's exclusion from the Hungarian voucher market
244. In *El Paso v. Argentina*, the tribunal found that the measures adopted by Argentina did not result in the neutralization of the investor's property rights. In the present case, the impact of the PIT reforms on SPI's investment is far more severe than in *El Paso v. Argentina*. Claimant was deprived not only of the value of its investment, but had its market share transferred to entities selected or controlled by the state, and was deprived of the ability to compete in the Hungarian voucher market.
245. Respondent argues that it did not redistribute or appropriate Claimant's profits for MNÜA or the banks that are SZÉP Card issuers.<sup>163</sup> Therefore, says Respondent, the Claimant's investment was not transferred to the state.

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<sup>161</sup> Id., at paras. 299.

<sup>162</sup> Id., at para. 299.

<sup>163</sup> Resp. PHB, para. 22

246. The majority of the Tribunal nonetheless finds that changes in the PIT law rendered Claimant's investment essentially worthless, and the value of Claimant's investment was indirectly transferred to a Hungarian state entity, which absorbed Claimant's market share.
247. Even if Hungary characterizes MNÜA as a charitable foundation, it was hand-selected and controlled by the state, and now has an effective monopoly over the voucher market. This same market was previously dominated, and arguably created, at least in part, by Claimant.
248. While no direct transfer nor seizure of the shareholdings themselves occurred, the Parties themselves agree that this is not required, in accordance with the definition above. The value of the Claimant's shares was indirectly transferred to the state when state-selected and state-owned entities gained a monopoly over the market that Claimant once dominated.

**B. TRIBUNAL ANALYSIS AND CONCLUSION**

249. On balance, the Majority of the Tribunal finds that Hungary's PIT reforms caused an indirect expropriation of Claimant's property, its shareholdings in SPH. Changes to the tax regime substantially deprived Claimant of the fundamental attributes of property in its investment, including the right to use and enjoy its property. The PIT changes rendered Claimant's investment essentially worthless and resulted in the previous value of Claimant's investment being transferred indirectly to the state.
250. What characterizes indirect expropriation is precisely that the value of the property (here, the shares) is impaired to such an extent as to destroy it substantially, even if the property as such (the shares) has not been taken. Had the state's measures been taken against the shares themselves, this would be a case of direct (not indirect) expropriation.
251. The Tribunal observes that another distinctive feature of indirect expropriation, as opposed to the breach of other standards of treatment, is that the value of the investor's property or rights is not only diminished, or destroyed, but also indirectly transferred to the state or to entities selected by the state.

252. The majority of the Tribunal finds that Hungary's changes to the PIT regime substantially deprived Claimant of the fundamental attributes of property in its investment and resulted in the previous value of Claimant's investment being transferred indirectly to the state. Therefore, the economic impact on Claimant suggests that an indirect expropriation occurred.
253. In his separate and dissenting opinion, Mr. Thomas contends that a temporary dispossession occurred, rather than an expropriation. According to Mr. Thomas, this conclusion imposes itself because Claimant's competitor Edenred was able to re-enter the market after the 2017 PIT reforms.
254. The Majority disagrees. An expropriation occurred notwithstanding that for whatever reason another competitor chose to remain in the market. The Majority disposes of very limited information on the reasons, circumstances and consequences of Edenred's decision to remain in the market. The Majority is therefore wary to draw any conclusion from that case. Respondent's own financial expert admitted that he had no insight at all into why Edenred decided to stay in the Hungarian market, or whether Edenred might succeed or might fail. Moreover, the impact of the same measures on different businesses may diverge. In one case, measures may seriously affect a company's profitability without precluding it from remaining in the market. In another case, the same measures may completely destroy the investment.
255. Moreover, Edenred was in the minority among the three French issuers. Chèque Déjeuner, like Sodexo, decided to leave the Hungarian market in 2014.

## **VII. BONA FIDE REGULATORY MEASURES**

### **A. OVERVIEW**

256. Respondent argues that the PIT reforms did not constitute an indirect expropriation because they constituted a *bona fide* regulatory measure.

257. The Tribunal must next determine, then, whether the PIT reforms constituted a *bona fide* regulatory measure rather than an indirect expropriation.
258. The Tribunal's analysis in this part of the Award is limited to the question of whether the measures at issue, the PIT reforms, constituted an indirect expropriation. Lawfulness of the expropriation will be discussed below.
259. As an initial matter, the Tribunal notes a certain overlap in arguments related to whether the measures were *bona fide* regulatory measures and the matter of lawfulness of an expropriation. Issues of whether the PIT reforms were made for a public purpose and were discriminatory are relevant to both matters. However, these are two separate legal analyses, and will be treated as such, despite the overlap.
260. In their post-hearing briefs, both Parties accepted the following statement, formulated by this Tribunal, of how to distinguish between a *bona fide* regulatory measure and an indirect expropriation at customary international law.<sup>164</sup> That statement reads as follows.

In general, the determination of whether a measure or series of measures by a Party, in a specific situation, constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors: the economic impact of the measure(s) and its duration, although the fact that a measure or a series of measures by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred; the extent to which the measure or series of measures interferes with the possibility to use, enjoy or dispose of the property; and the character of the measure or series of measures, notably its object, context and intent. For greater certainty, except in the rare circumstance where the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measure or series of measures by a Party that are designed and applied to protect legitimate public policy objectives do not constitute indirect expropriation.

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<sup>164</sup> Cl. PHB, para. 13; Resp. PHB, para. 50.

261. On the facts of the case, the Majority of the Tribunal finds that the PIT reforms were not *bona fide* regulatory measures, and therefore militate in favor of a finding of indirect expropriation.
262. The Tribunal has already analyzed the economic impact of the measures, and the extent to which the measures interfered with Claimant’s possibility to use, enjoy, and dispose of its property. Applying the analysis above, the Majority of the Tribunal finds that these factors militate in favor of the PIT reforms constituting an indirect expropriation and not a *bona fide* regulatory measure.
263. The Tribunal will now analyze the other factors encapsulated by the agreed-upon definition distinguishing a *bona fide* regulatory measure from an indirect expropriation. Namely, the Tribunal will analyze the character of the series of measures, including their object, content, intent, their severity, and whether they were non-discriminatory.
264. The definition does not specify that these criteria must be met in the cumulative.
265. The Tribunal notes that these criteria overlap. The Tribunal’s “object, content, and intent” analysis will include discussion of whether the measures were enacted for a legitimate public policy purpose, in accordance with the definition above.
266. According to Claimant, the “object, content, and intent” analysis means that the object, content, and intent of the regulations must be proportionate to the ends to be achieved.<sup>165</sup> Claimant’s discussion of proportionality overlaps with its argument about the “severity” of the measures. While the proportionality language is not part of the agreed-upon definition above, it is reflected in the caselaw cited by Claimant as part of its argument.<sup>166</sup> Thus, the Tribunal will analyze the proportionality of the measures below when determining whether the object, content, and intent of the measures justified their severity.

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<sup>165</sup> Cl. PHB, para. 13.

<sup>166</sup> Cl. PHB, para. 52, footnote 107.

**B. OBJECT, CONTENT, INTENT, AND POLICY OBJECTIVES**

267. With respect to Hungary's intent in undertaking the series of acts that led to the alleged indirect expropriation, the Tribunal notes that the Parties' post-hearing briefs agree that the Tribunal must consider a state's intent in taking the allegedly expropriatory measures.<sup>167</sup>
268. The Parties seem to accept that a state's intent is not necessarily decisive of whether the expropriation is unlawful. Claimant says that a state's intent alone is not required to determine the *bona fides* of the tax measures, but is relevant.<sup>168</sup> Respondent also admits that, per relevant caselaw, the state's intent is not necessarily decisive, but notes that many tribunals are dealing with substantially different circumstances.<sup>169</sup>
269. The Tribunal notes that it could find the expropriation to be unlawful even if it were unable to determine the state's intent, based on the lack of compensation and/or a finding of discrimination.
270. The Claimant says that the Tribunal must evaluate a state's intent based on the totality of the circumstances, including the "object, context, and intent" referenced in the Parties' agreed-upon definition of indirect expropriation.<sup>170</sup>
271. Respondent takes a more limited view of what the Tribunal should consider when determining a state's intent. Regarding regulatory measures and particularly tax or fiscal measures of general application "there is a more prominent view that such measures will only result in liability where there is an intention to harm the investor or force it to abandon its property."<sup>171</sup> Respondent says that, "barring obvious and gross abuse of power, the

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<sup>167</sup> Cl. PHB, para. 15; Resp. PHB, para. 53.

<sup>168</sup> Cl. PHB, para. 15.

<sup>169</sup> Resp. PHB, para. 54.

<sup>170</sup> Cl. PHB, para. 15.

<sup>171</sup> Resp. PHB, paras. 55-56, citing *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability (December 14, 2012), para. 376, citing Restatement (Third) of the Foreign Relations Law of the United States, Section 712, cmt. G (1987) (RL-0007 and RL-0135).



Tribunal's exercise is respectfully limited to confirming the *prima facie* existence of a public purpose behind the measures.”<sup>172</sup>

272. This Tribunal finds that applying Respondent's standard would allow any state to articulate a *prima facie* public purpose behind measures that are discriminatory beneath the surface. Thus, this Tribunal must investigate whether a purpose lies beyond Hungary's articulation of a public purpose for the PIT reforms. To do so, the Tribunal will consider the totality of the circumstances, including the “object, context, and intent” of the alleged expropriatory measures.<sup>173</sup>
273. On balance, the Majority of the Tribunal finds the argument that Hungary's primary intent in enacting the PIT reforms was to keep foreign voucher issuers out of the market more persuasive than the argument that Hungary's motivation for the reforms was for charitable purposes or to pursue a public purpose.
274. It is clear that Hungary had at least a *prima facie* public welfare purpose in mind when enacting the PIT reforms. Vouchers themselves served a social purpose in helping to provide healthy meals to Hungarians. Naturally, any reforms related to the voucher system would therefore be related to some social purpose.
275. Hungary's stated objectives in enacting the reforms were: to guarantee that SZÉP Card issuers had experience and presence in Hungary, to fight corruption, to reduce the fees charged to customers, and to expand tourism and support healthy eating.<sup>174</sup>
276. In support of its claim that the voucher system reforms were made for a public purpose, Respondent asserts that it conducted a review of the voucher system that revealed,

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<sup>172</sup> Resp. PHB, para. 57.

<sup>173</sup> Cl. PHB, para. 15.

<sup>174</sup> Resp. C-Mem., paras. 73, 136-138.

“numerous structural problems, rampant misuse, and economic inefficiencies inherent in the voucher system.”<sup>175</sup>

277. Hungary identified six primary problems with the voucher system,<sup>176</sup> including 1) a lack of audits or controls on issuers who were investing large sums of money, which put customers at risk;<sup>177</sup> 2) issuer’s inability to monitor vouchers, resulting in vouchers being used for items other than food;<sup>178</sup> 3) vouchers being used as *de facto* currency, resulting in a secondary market for vouchers;<sup>179</sup> 4) issuers keeping revenue from vouchers that were never redeemed, creating an advantage for issuers at taxpayers’ expense;<sup>180</sup> 5) issuers charging 6-10% commission to employers and merchants, thereby diverting tax benefits from the intended recipients;<sup>181</sup> and 6) in case of loss or theft, voucher holders had no recourse.<sup>182</sup> Respondent asserts that it needed to reform the voucher system to rectify these failings.
278. However, Respondent was unable to produce any documents supporting that such a review had been taken.<sup>183</sup> In its Counter-Memorial, Respondent cites a report by Ernst and Young that it “had commissioned to analyze the fringe-benefit related legislative and tax frameworks in force in other countries” as part of its comprehensive review. The report presents only a general overview of the fringe benefit systems used in other countries, and

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<sup>175</sup> Resp. C-Mem., para. 62.

<sup>176</sup> Resp. C-Mem., para. 62.

<sup>177</sup> Resp. C-Mem., para. 63.

<sup>178</sup> Resp. C-Mem., para. 64.

<sup>179</sup> Resp. C-Mem., para. 65.

<sup>180</sup> Resp. C-Mem., para. 66.

<sup>181</sup> Resp. C-Mem., para. 67.

<sup>182</sup> Resp. C-Mem., para. 68.

<sup>183</sup> See Tr. Day 2, 459:6-488:22 (██████████ Cross-Examination).

does not discuss their successes and failures. Moreover, the report is dated March 2012, after the 2012 PIT reforms had been drafted and come into force.<sup>184</sup>

279. At the hearings, [REDACTED] and [REDACTED] both testified that they did not become involved in the PIT reform process until after these alleged reviews had been taken.<sup>185</sup> Respondent was unable to produce any documentary evidence nor any witnesses to show that Respondent had any reason for concern, prior to the enactment of the PIT reforms, about its or any specific voucher issuer's capitalization or ability to meet payment obligations, allegations of voucher misuse, or excessively high commissions.<sup>186</sup>
280. Multiple statements by government officials at the time of the PIT reforms strongly suggest that the reforms were not merely made for a public purpose.<sup>187</sup> Claimant submits many statements by Hungarian leaders made at the time the PIT reforms were enacted that suggest that Respondent intended for the reforms to discriminate against foreign voucher issuers.<sup>188</sup> Many politicians and ministers stated their goal for profits from the voucher system to remain in Hungary, for the voucher system to be state-owned rather than involve French issuers, and for foreign companies to no longer profit from the voucher system.<sup>189</sup>
281. Moreover, when Claimant made efforts to meet with Hungarian leaders to discuss a compromise before the PIT reforms were enacted, they were largely rebuffed.<sup>190</sup>
282. On balance, the Majority of the Tribunal finds that the words and actions of Hungarian officials suggest that the PIT reforms were not made for a public purpose. Despite

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<sup>184</sup> See also Tr. Day 2, 461:2-462:12 ([REDACTED] Cross-Examination).

<sup>185</sup> See Tr. Day 2, 327:6-11; 349:4-7 ([REDACTED] Cross-Examination) (noting that [REDACTED] joined the reform efforts in February, 2011, after the Government had already decided to create the SZEP Card); Tr. Day 2, 490:4-19 ([REDACTED] Cross-Examination) (stating that [REDACTED] was appointed President of the Service Company in October 2011 with the mandate to turn the Erzsébet voucher into a reality, the decision already having been made to launch it).

<sup>186</sup> Cl. PHB, paras. 91-93.

<sup>187</sup> Cl. Mem., paras. 159-165.

<sup>188</sup> See Cl. PHB, paras. 81-88.

<sup>189</sup> Cl. Mem., paras. 159-165.

<sup>190</sup> See Cl. Mem., paras. 145-165.

Hungary's stated *prima facie* public purpose, the reforms, as enacted, were not clearly designed to achieve their purported ends.

283. Hungary was free to reform its PIT. It would have been possible for Hungary to do so in a way that did not result in indirect expropriation. The specific PIT reforms that Hungary adopted in the present case were intended to exclude Claimant from the market and succeeded in doing so.
284. The issue of the public purposes of the reforms will be discussed further in the analysis of severity of the measures, below.

**C. SEVERITY OF THE MEASURES**

285. The Tribunal will analyze the severity of the measures according to the definition above that was accepted by the Parties.
286. As discussed above, the economic impact of the measures was severe. The effect of the PIT reforms was to strip Claimant's investment of its value. The measures severely damaged Claimant's ability to use, enjoy, or dispose of the shareholdings.
287. The question then remains as to whether the object, content, and intent of the reforms were proportional to the severity of the reforms.
288. The Majority of the Tribunal is persuaded that the severity of Hungary's PIT reforms was not proportional to the objectives stated above. As stated above, Hungary has articulated a public purpose in changing the PIT law. Hungary's stated objectives were as follows: to guarantee that SZÉP Card issuers had experience and presence in Hungary; to fight corruption; to reduce fees charged to customers; and to expand tourism while supporting healthy eating. Hungary argues these ends justified the tax reforms.

289. The SZÉP Decree of 13 April 2011, which specified the conditions that SZÉP Card issuers must meet, specified the following:<sup>191</sup>

#### 4. Conditions of the issuance of the card

##### Section 13

(1) Any service provider defined in section 2 (2) point d) of Act XCVI of 1993 on Voluntary Mutual Insurance Funds, with the exception of natural persons is entitled to issue the card, which is established for an undefined term or for a fixed term of at least 5 years from the beginning of its activities as issuer, which (together with the companies operating as an acknowledged or implied company group as defined in Act IV of 2006 on Business Associations) fulfills the following conditions together:

a) maintains a place of service open to clients in every Hungarian settlement with more than 35.000 residents;

b) has at least 100,000 credit cards issued by itself according to the data of the closed business year;

c) has at least 2 year experience on the field [sic] of issuing the electronic voucher cards used for enjoying non-salary benefits defined in Section 71 of the PIT Act, and the number of the voucher cards issued by it exceed 25,000 according to the data of the last closed business year.

290. Based on these conditions, only three banks qualified to issue the SZÉP Card: OTP, K&H, and MKB. At the time of enacting the SZÉP Decree, Hungary knew that these were the only three entities that would meet its new criteria.<sup>192</sup> SPI, Edenred and Chèque Dejeuner, the three French issuers who had 85% of the voucher issuance market share at the time of the SZÉP Decree, did not satisfy the Decree's conditions.<sup>193</sup>

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<sup>191</sup> See Government Decree 55/2011 (IV. 12.) on the Rules of Issuance and Use of the Széchenyi Recreation Card, in force as of April 13, 2011 (RL-0063)

<sup>192</sup> See Tr. Day 2, 453:22 (██████████ Cross-Examination)

<sup>193</sup> RfA, para. 58.

291. The Hungarian government had a financial interest in at least two of the SZÉP Card issuers, and its interests have increased over time. The Hungarian state has had a 5.12% stake in OTP and 100% stake in MKB since 29 September 2014.<sup>194</sup> In March 2016, [REDACTED] a witness at the hearings in this case who was in [REDACTED] [REDACTED], the entity that issues SZÉP Cards.<sup>195</sup> [REDACTED]  
[REDACTED]<sup>196</sup>
292. Respondent notes that MKB was solely German-owned from 2010 to 2014, K&H was and still is a Belgian bank, and 62.5% of OTP's shareholders were foreign individuals as of December 2011.<sup>197</sup>
293. Hungary does not deny that its reforms had the effect of limiting the SZÉP Card issuers to these three banks. However, it argues that doing so was entirely justified in light of its stated social purpose.
294. The SZÉP Decree was amended on 16 June 2011, to limit the size of commissions that SZÉP Card issuers could charge hotel merchants, and that hotel merchants could charge other merchants providing ancillary services such as restaurant services.<sup>198</sup> Claimant argues that these limits constituted an additional barrier to market entry because only entities that could depend on other lines of business could afford to issue the SZÉP Card.<sup>199</sup>
295. Hungary's stated social objective was not supported by the reforms enacted in the SZÉP Decree. Hungary asserted that having banks with a large presence in Hungary would give them the expertise and presence necessary to serve Hungarians. Yet Hungary offered no

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<sup>194</sup> Cl. Mem., para. 81.

<sup>195</sup> Tr. Day 2, 305:16-306:9 ([REDACTED] Cross-Examination)

<sup>196</sup> Tr. Day 2, 306:10-18 ([REDACTED] Cross-Examination)

<sup>197</sup> Resp. C-Mem., para. 82.

<sup>198</sup> Cl. Mem., para. 83.

<sup>199</sup> Cl. Mem., para. 85; Resp. C-Mem., paras. 81-82.

justification or explanation as to how having three pre-chosen institutions able to issue the SZÉP Card was necessary to obtain their stated objectives.

296. Hungary has not offered any specific arguments why the SZÉP Decree's issuance requirements were necessary and proportionate for Hungary to achieve its stated objectives of protecting consumers and creditors. Hungary has not presented any evidence that it considered alternative plans, such as establishing a system for supervising voucher issuers or creating a bank guarantee mechanism. Hungary has not justified why it had to give state vouchers preferential tax treatment, even going so far as to create a state monopoly on vouchers, in order to achieve its stated public purpose.
297. After careful consideration, the Majority of the Tribunal finds that the severe impact of Hungary's PIT reforms was not proportional to its stated objectives, thereby suggesting that an expropriation occurred. Hungary effectively hand-selected three banks (with two of which it had close financial ties) to issue the SZÉP Card; and chose a state-owned entity to issue the Erszébet vouchers. Nowhere does Hungary explain how these means justified its stated ends of guaranteeing that SZÉP Card issuers had experience and presence in Hungary, fighting corruption, reducing customer fees, expanding tourism, and supporting healthy eating. Hungary's means are not proportional (and not obviously related) to its ends.
298. Thus, Hungary's severe PIT reforms were not proportional to its goals. The severe economic impact of the reforms on the Claimant was unjustified. Hungary restricted entry to the voucher market, excluding the French voucher issuers who had dominated the market for decades, and instead effectively hand-selected entities to issue the SZÉP and Erszébet vouchers. Hungary also has not articulated how the reforms would have led to its stated ends of protecting consumers and creditors, fighting corruption, expanding tourism, and supporting healthy eating. The disproportionality of Hungary's measures to achieving its ends suggests that the reforms were not *bona fide* regulatory measures.
299. Even if proportionality is not required for the Tribunal to find that the measures were *bona fide*, Hungary has not adequately explained how its actions would lead to its stated goals.

Nor has Respondent shown that alternative ways of achieving its goals were even considered.

**D. INDIRECT EXPROPRIATION VERSUS *BONA FIDE* REGULATORY MEASURES**

300. On balance, for the reasons discussed below, the Majority of the Tribunal finds that all of the factors that distinguish between a *bona fide* regulatory measure and an indirect expropriation, according to the definition agreed by the Parties, militate in favor of a finding that the relevant measures considered by this Tribunal constitute an indirect expropriation.
301. In its fact-based inquiry, the Majority of the Tribunal has considered the economic impact of all relevant measures and their duration, the extent to which the series of measures interfered with Claimant's possibility to use and enjoy its property, and the character of the series of measures, notably their object, context and intent. These measures viewed in their totality all lead to a conclusion of indirect expropriation.
302. The severity of the series of measures considered makes them excessive in light of their stated purpose. The Majority cannot find the measures as designed or applied to protect Hungary's stated policy goals.
303. Thus, the Majority of the Tribunal finds that the measures constituted an indirect expropriation.
304. In this connection, the Tribunal has noted that no fair and equitable treatment ("FET") claim is before this Tribunal, nor any general claim of discriminatory treatment. Therefore, the Tribunal considers the issue of discrimination in tax measures as only one factor in determining whether the measures were *bona fide* or constituted unlawful expropriation.
305. This factor is part of an ensemble of indicia to be considered in making the distinction between a *bona fide* regulatory measure and an indirect expropriation, as defined by the Parties in their post-hearing briefs.



306. The Majority of the Tribunal could have made its determination that an expropriation occurred based on the other factors discussed in this Award, as noted above. For the sake of completeness, the Tribunal addresses discrimination as part of the factual matrix which the Parties presented for consideration.
307. Neither side offers a clear definition of discrimination as relevant in this arbitration. Respondent appears to suggest that, to be relevant, discrimination must aim at Claimant specifically, singling out SPI in particular. By contrast, Claimant focuses more on discrimination in general, against foreign voucher issuers. Claimant's claim is distinct from what would constitute a discrimination claim under EU law.
308. Claimant notes that neither the BIT nor relevant arbitral awards contain a definitive statement of what "discriminatory" means. However, tax measures cannot be arbitrary, discriminatory, confiscatory, or abusive. The Tribunal should consider the intent and effect of the tax measure in question when determining whether that measure is discriminatory. A tax measure "crafted to force abandonment of a business enterprise by ruining its economic value, or to provide an investor's competitors with a beneficial fiscal framework that permits more favorable competition" would qualify as abusive.<sup>200</sup> To constitute an expropriation, a tax measure must also substantially deprive the investor of its use and enjoyment of the investment.<sup>201</sup> Claimant argues that the SZÉP Decree and subsequent creation of the SZÉP Card and Erszébet voucher had the effect of creating a new market framework that favored its competitors to the point that its investments lost their value and it was forced to close SPH, making the reforms qualify as discriminatory and abusive.
309. Respondent appears to agree with Claimant that no clear and definitive requirements exist to determine when *bona fide* tax reforms are discriminatory. However, Respondent then further narrows the definition of discrimination. Under the BIT's provisions regarding expropriation, a state cannot undertake abusive or illegitimate measures that interfere with

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<sup>200</sup> Cl. PHB, para. 17, citing W.W. Park, *Arbitrability and Tax*, in L. Mistelis And S. Brekoulakis (Eds.), *Arbitrability: International and Comparative Perspectives*, 179-205 (2009), Kluwer Law International, paras. 10-21 (CL-0080).

<sup>201</sup> Cl. PHB, para. 18.

a distinct property right, and that substantially deprive an investor of the use or control of its investment.<sup>202</sup>

310. Respondent reiterates that, generally, a state has the power to adopt *bona fide* measures (1) for the public interest (2) that are non-discriminatory and (3) do not contravene any specific undertaking.<sup>203</sup> Respondent further notes a presumption of deference to the state in relevant prior awards.<sup>204</sup> Thus, normal tax policies, practices of revenue generation, or shifting normal fiscal burden have not been likely to result in liability.<sup>205</sup> Respondent argues that if tax reforms were not *bona fide*, and even discriminatory, these measures would not necessarily be tantamount to expropriation under the BIT or international law.<sup>206</sup> The measures would need to have interfered with a distinct property right, and dispossession of the investment must have occurred. Respondent notes that the Tribunal must make a fact-intensive inquiry to determine whether the tax measures are illegitimate or abusive, and therefore constitute discrimination.<sup>207</sup>
311. In the absence of a clear definition of “discrimination,” Respondent argues that the term must be understood in the context of the particular tax measures at issue.<sup>208</sup> In this context, “discrimination does not mean differentiating between two taxpayers or products,” because all tax measures necessarily differentiate between taxpayers or products.<sup>209</sup> In a situation where merely a different impact exists between different actors, it will be unlikely that a claimant can establish improper discrimination.<sup>210</sup>

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<sup>202</sup> Resp. PHB, para. 62.

<sup>203</sup> Resp. PHB, para. 61.

<sup>204</sup> Resp. PHB, para. 65.

<sup>205</sup> Resp. PHB, para. 66.

<sup>206</sup> Resp. PHB, para. 69.

<sup>207</sup> Resp. PHB, para. 64.

<sup>208</sup> Resp. PHB, para. 41.

<sup>209</sup> Resp. PHB, para. 41.

<sup>210</sup> Resp. PHB, para. 41, citing United Nations Conference on Trade and Development, *Expropriation a Sequel*, UNCTAD Series on Issues in International Investment Agreements II, at 96, UNCTAD/DIAE/IA/2011/7, U.N. Sales

312. Claimant points to the CJEU case *Commission v. Hungary*, as did the *Edenred v. Hungary* tribunal, when determining that the reforms were discriminatory. The CJEU ruled that Erzsébet and SZÉP Card regulations were unlawful because they were disproportionate, discriminatory, and not justified by the public interest.<sup>211</sup> The exact meal vouchers in question indirectly discriminated against non-Hungarian EU nationals, and thereby violated the principles of freedom of establishment and freedom to provide services guaranteed by EU law.<sup>212</sup> As Respondent notes, the CJEU proceedings involve related but different issues than the BIT, and a violation of EU law does not necessarily mean a BIT violation.<sup>213</sup>
313. In the post-hearing briefs, the Tribunal asked Claimant whether the state could permissibly eliminate the tax benefit granted to hot and cold meal vouchers entirely, or regulate maximum commissions chargeable to employers and affiliates. Claimant replied that Hungary could have lawfully adopted reforms by adopting measures that affected all voucher issuers equally. For example, Hungary could have eliminated tax benefits for meal vouchers entirely or limited commission levels. Such hypothetical reforms would have had a proven public purpose proportionate to Hungary's stated aims and been non-discriminatory, rather than "imbued with improper intent against Claimant."<sup>214</sup> Claimant clarified for the Tribunal that the gravamen of its claim in this case is that the post-2010 voucher reforms were motivated by Hungary's improper intent to replace French businesses with state-chosen actors. It did so through discriminatory taxes that were not

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No. E.12.II.D.7 (2012) (RL-0151). The passage further provides that discrimination covers racial, religious, ethnic and other types of discrimination prohibited under customary international law, but these concerns are not alleged to be at issue here. See also *Link-Trading Joint Stock Company v. Department for Customs Control of the Republic of Moldova*, UNCITRAL, Final Award (April 18, 2002), para. 69 (changes to the annually amended annual budget were not arbitrary or discriminatory because they were of general application and not directed specifically at the claimant). (RL-0021).

<sup>211</sup> Cl. PHB, para. 19.

<sup>212</sup> Cl. PHB, para. 20.

<sup>213</sup> Resp. PHB, para. 70.

<sup>214</sup> Cl. PHB, para. 21.

justified by a proven public purpose nor proportionate to Hungary's stated aims.<sup>215</sup> Respondent replied that if this is the gravamen of Claimant's claim, then Claimant's argument is inconsistent. Claimant has never explained why only the challenged reforms gave rise to a claim, while the 2010 reforms do not.

314. In this connection, Claimant seems to say that the 2012 measures had a more significant effect, and that the 2010 reforms were not discriminatory. Respondent suggests that according to Claimant's explanation of the gravamen of its claim, both should have been problematic.<sup>216</sup>
315. Claimant's arguments, according to Respondent, primarily involve nationality-based discrimination. Respondent argues that the measures at issue applied to all Hungarian taxpayers equally, not just to the Claimant or foreign investors. Therefore, says Respondent, the reforms cannot be said to discriminate against foreigners.
316. The Tribunal accepts Claimant's broader view of the meaning of "discrimination." The narrow view that a claim of discrimination would require discrimination against Claimant specifically would mean that only instances of overt discrimination would violate the BIT. Indirect expropriation is, by definition, subtler.
317. Thus, an analysis of discrimination in the instant case must involve the Tribunal's scrutiny of whether Hungary wished to exclude certain players from the voucher market when adopting the allegedly expropriatory reforms.
318. On balance, the Majority of the Tribunal finds Claimant's argument more persuasive. The tax regime places a higher tax burden on Claimant's vouchers as compared to SZÉP Cards and Erszébet vouchers, without objective justifications for doing so. In a market dominated by a few players (essentially, the three French meal voucher issuers), the PIT reforms were not general and indiscriminate, but aimed at favoring state-chosen entities.

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<sup>215</sup> Cl. PHB, para. 22.

<sup>216</sup> Resp. PHB, paras. 78-85.

319. The Tribunal notes that a thin line exists between indirect expropriation and non-expropriatory abusive conduct that has an adverse effect on the economic value of the investment.
320. Prior to enacting the SZÉP Decree, Hungary had full knowledge that it chose the SZÉP issuance criteria in a way that discriminated against Claimant and other market leaders.<sup>217</sup> While the SZÉP Decree has language that ostensibly applies to all financial institutions, the record shows that Hungary knew that only three institutions would meet its stringent criteria. Hungary, therefore, effectively hand-selected the institutions that would issue the SZÉP Card.
321. Hungary's intent to discriminate against foreign investors is further evidenced by the statements and actions of Hungarian officials prior to the PIT reforms. As discussed above, Claimant has documented many statements by Hungarian leaders made at the time the PIT reforms were enacted that suggest that Respondent intended for the reforms to be discriminatory against foreign voucher issuers.<sup>218</sup> Many politicians and ministers stated their goals in enacting the reforms included profits from the voucher system remaining in Hungary, the voucher system to be state-owned rather than involve French issuers, and for foreign companies to no longer profit from the voucher system.<sup>219</sup>
322. Relevant case law supports the finding that Respondent's tax regime was discriminatory. While the Tribunal reiterates that decisions by other tribunals are not binding on this Tribunal, the Tribunal recognizes the importance of consistency in international investment law.
323. In *Commission v. Hungary*, the CJEU found that the SZÉP and Erszébet regulations were disproportionate to Hungary's stated aims of protecting users and creditors, not justified by these stated aims, and discriminated against foreign issuers. While the EU regulations

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<sup>217</sup> Tr. Day 2, 357:3-373:20 (██████████ Cross-Examination)

<sup>218</sup> See Cl. PHB, para. 81-88.

<sup>219</sup> Id.

at issue in that case differ from the BIT provisions, the CJEU's analysis of discrimination, proportionality, and the alleged public purpose of the tax reforms are highly relevant to this arbitration.

324. The Majority of the Tribunal stresses its disagreement with the suggestion by Mr. Thomas that the Majority has “given full effect to the Court of Justice's ruling in” *Commission v. Hungary*. The majority does not “rely” on any CJEU opinion. Indeed, such reliance would be highly problematic in an investor-state arbitration such as the present case. Rather, the Majority has considered findings of EU bodies, including the CJEU, not as binding on this ICSID Tribunal, but as aids to analytic clarity.
325. Respondent cites *EnCana v. Ecuador* for the proposition that a tax regime is presumptively a *bona fide* regulatory measure. In *EnCana v. Ecuador*, the tribunal found that Ecuador did not breach its BIT with Canada when it changed its VAT law and subsequently denied a VAT refund to two Canadian subsidiaries that had contracts with the Ecuadorian state oil agency. The tribunal found that, absent a specific commitment from the host state, a foreign investor has neither a right nor a legitimate expectation that the tax regime will not change.<sup>220</sup> Only in an extreme case will a general tax be considered equivalent in effect to an expropriation.<sup>221</sup> Although the VAT reforms financially harmed EnCana's subsidiaries, both were able to function profitably and engage in their normal range of activities in their core businesses of extracting and exporting oil.
326. *EnCana v. Ecuador* differs substantially from the instant case. The expropriation claim in *EnCana* failed because the changes in the tax regime were not egregious enough to be equivalent to an expropriation. The claimants in *EnCana v. Ecuador* were not deprived of the use of their investment, nor were their investments deprived of their value.
327. By contrast, Hungary's PIT reforms completely deprived SPI of the use and enjoyment of its investment in SPH and rendered its shareholdings worthless. SPI was no longer able to

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<sup>220</sup> *EnCana*, at para. 173.

<sup>221</sup> *EnCana*, at para. 173.

function in the voucher market in Hungary, which was effectively taken over by state and state-chosen entities as a result of the reforms. Although in theory the reform was general, *de facto* it had a direct, exclusive, and intentional impact on Claimant and the other two French voucher operators. Unlike in *EnCana*, the PIT reforms in our case constitute an expropriation.

328. Consequently, the Tribunal finds that Hungary's PIT reforms were discriminatory against foreign voucher issuers, including the Claimant, leading to a finding that expropriation occurred.

## VIII.      **LAWFULNESS OF THE EXPROPRIATION**

### A.      **OVERVIEW**

329. Having determined that an indirect expropriation occurred, the Majority of the Tribunal now turns to the question of whether that expropriation was lawful.

330. The Parties agreed in their post-hearing briefs that the BIT prohibits only unlawful dispossession, articulated in Article 5(2) of the BIT as “mesures d’exportation [*sic*] ou de nationalisation ou toutes mesures dont l’effet est de déposséder, directement ou indirectement, les investisseurs de l’autre Partie...”<sup>222</sup>

331. On analysis of the facts of the record and legal principles, the Majority of the Tribunal has been persuaded that the expropriation was unlawful.

332. Article 5(2) of the BIT provides as follows:

2. Les Parties contractantes ne prennent pas de mesures d'exportation [*sic*: *to be read «expropriation»*] ou de nationalisation ou toutes autres mesures dont l'effet 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

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<sup>222</sup> Cl. PHB, para. 5; Resp. PHB, para. 32.

et à condition que ces mesures ne soient pas discriminatoires, ni contraires à un engagement particulier.

Les mesures de dépossession qui pourraient être prises doivent donner lieu au paiement d'une indemnité prompte et adéquate dont le montant devra correspondre à la valeur réelle des investissements concernés à la veille du jour où les mesures sont prises ou connues dans le public.

Cette indemnité sera payée aux investisseurs en monnaie convertible, et sera librement transférable. Elle sera versée sans délai à compter de la date de la dépossession, faute de quoi elle produira jusqu'à la date du versement des intérêts calculés au taux du marché approprié.

In English translation:<sup>223</sup>

2. 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.

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 transferable. It shall be paid promptly starting from the date of dispossession, failing which, interest calculated at the applicable market rate shall be charged up to the date of payment.

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<sup>223</sup> RL-0046. Note that Claimant uses a different, “free translation from the French original,” (CL-0001) in its submissions. Claimant’s Memorial on the Merits, para. 210, translates these provisions as, “The Contracting Parties shall not take measures of [expropriation] or nationalization or any other measures which have the effect of dispossessing, directly or indirectly, the investors of the other Contracting Party of their investments in their territory and maritime zones, except for a public purpose and provided that such measures are neither discriminatory nor contrary to a specific commitment. Any measures of dispossession which could be adopted must result in the payment of prompt and adequate compensation, the value of which shall correspond to the real value of the investment on the day before the measures were taken or became public knowledge.” These variations are not significant for the Tribunal’s analysis.



333. To be lawful, an expropriation must (i) involve a taking for a public purpose, (ii) be non-discriminatory or not contrary to a specific commitment, and (iii) result in the payment of prompt and adequate compensation.<sup>224</sup>
334. In their post-hearing briefs, the Parties agreed that under Article 5(2) of the BIT, these three conditions must be satisfied cumulatively.<sup>225</sup>
335. Neither party argues that any compensation was paid to Claimant. Therefore, the Tribunal needs only address the first and second elements, which is to say, public purpose and non-discrimination.

## **B. TRIBUNAL ANALYSIS**

336. With respect to the second element of lawfulness, the Tribunal notes that it appears uncontested that Respondent made no specific commitment to Claimant for maintaining a favorable tax regime. Thus, the issues for the Tribunal analysis must center on whether the expropriation was (i) for a public purpose and (ii) non-discriminatory.

### **(1) Public Purpose**

337. The Majority of the Tribunal finds that Hungary's PIT reforms were not enacted for a public purpose, making the expropriation unlawful. Some Hungarian lawmakers may have supported the reforms solely for charitable purposes and to reduce fraud in the voucher system. Upon closer examination, however, the justification behind the reforms and the manner in which the reforms were enacted belies a purpose of discrimination against foreign voucher issuers.
338. First, the Tribunal must determine what it must consider when deciding whether a state had a legitimate public purpose in its expropriation. Respondent takes a limited view of what the Tribunal should consider when determining a state's intent in enacting reforms.

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<sup>224</sup> Cl. PHB, para. 5; Resp. PHB, para. 35.

<sup>225</sup> Cl. PHB, para. 7; Resp. PHB, para. 35.

Respondent argues that, regarding regulatory measures and especially tax or fiscal measures of general application, the prevailing view is that “such measures will only result in liability where there is an intention to harm the investor or force them to abandon their property.”<sup>226</sup>

339. Respondent says that, “barring obvious and gross abuse of power, the Tribunal’s exercise is respectfully limited to confirming the *prima facie* existence of a public purpose behind the measures.”<sup>227</sup> This Tribunal finds that applying Respondent’s standard would allow any state to articulate a *prima facie* public purpose behind discriminatory measures. Thus, this Tribunal must engage in an intensive, fact-based investigation of whether the PIT reforms had a public purpose and served one.
340. On balance, the Majority of the Tribunal finds that Hungary’s primary intent in enacting the PIT reforms was to keep foreign voucher issuers out of the market. Hungary’s argument that it enacted the reforms for charitable purposes appears doubtful after examination of the lack of a relationship between the stated purpose of the reforms and their content.
341. The Majority of the Tribunal acknowledges that Hungary may have had at least a *prima facie* public purpose in mind when choosing to reform the PIT. Since vouchers themselves serve a social purpose by helping to provide healthy meals to Hungarians, any voucher system reforms would inherently be related to some social purpose.
342. Hungary’s stated objectives in enacting the reforms were: to guarantee that SZÉP Card issuers had experience and presence in Hungary, to fight corruption, to reduce the fees charged to customers, and to expand tourism and support healthy eating.<sup>228</sup>

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<sup>226</sup> Resp. PHB, para. 55-56, citing *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability (December 14, 2012), para. 376, citing Restatement (Third) of the Foreign Relations Law of the United States, Section 712, cmt. G (1987) (RL-0007 and RL-0135).

<sup>227</sup> Resp. PHB, para. 57.

<sup>228</sup> Resp. C-Mem., paras. 73, 136-138.

343. However, Hungary presented scant evidence of an actual need to reform the voucher system to improve the public good. In support of its claim that the voucher system reforms were made for a public purpose, Respondent asserts that it conducted a review of the voucher system that revealed “numerous structural problems, rampant misuse, and economic inefficiencies inherent in the voucher system.”<sup>229</sup> Hungary identified six primary problems with the voucher system,<sup>230</sup> including 1) a lack of audits or controls on issuers who were investing large sums of money, which put customers at risk;<sup>231</sup> 2) issuers’ inability to monitor vouchers, resulting in vouchers being used for items other than food;<sup>232</sup> 3) vouchers being used as *de facto* currency, resulting in a secondary market for vouchers;<sup>233</sup> 4) issuers keeping revenue from vouchers that were never redeemed, creating an advantage for issuers at taxpayers’ expense;<sup>234</sup> 5) issuers charging 6-10% commission to employers and merchants, thereby diverting tax benefits from the intended recipients;<sup>235</sup> and 6) in case of loss or theft, voucher holders had no recourse.<sup>236</sup> Respondent asserts that it needed to reform the voucher system to rectify these failings.

344. However, Respondent was unable to produce any documents to support that a review of the voucher system had occurred.<sup>237</sup> As noted above, Respondent’s Counter-Memorial cites a March 2012 report by Ernst and Young that it “had commissioned to analyze the fringe-benefit related legislative and tax frameworks in force in other countries” as part of such a review. While the report outlines the voucher frameworks in other countries, the

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<sup>229</sup> Resp. C-Mem., para. 62.

<sup>230</sup> Resp. C-Mem., para. 61.

<sup>231</sup> Resp. C-Mem., para. 63.

<sup>232</sup> Resp. C-Mem., para. 64.

<sup>233</sup> Resp. C-Mem., para. 65.

<sup>234</sup> Resp. C-Mem., para. 66.

<sup>235</sup> Resp. C-Mem., para. 67.

<sup>236</sup> Resp. C-Mem., para. 68.

<sup>237</sup> Tr. Day 2, 459:6-488:22 (██████████ Cross-Examination)

report does not analyze the specific workings of other fringe benefit systems. Moreover, the report postdates the enactment of the 2012 PIT reforms.<sup>238</sup>

345. Respondent did not produce any documentary evidence nor any witnesses to show that Respondent had any reason for concern about any specific voucher issuer's capitalization or capacity to meet financial obligations, allegations of voucher misuse, or excessive commissions that would prompt enactment of the PIT reforms.<sup>239</sup> Witnesses [REDACTED] [REDACTED] both testified that they became involved in the PIT reform process only after the alleged reviews had occurred.<sup>240</sup>
346. Hungarian politicians and ministers made a number of statements near the time of the PIT reforms that strongly suggest that they intended the reforms to discriminate against foreign voucher issuers.<sup>241</sup> Such statements included that the goal of the reforms was for profits from the voucher system to remain in Hungary, for foreign companies to no longer profit from the voucher system, and for the system to be state-owned rather than involve French issuers.<sup>242</sup>
347. Also, Claimant made reasonable efforts to meet with Hungarian leaders to discuss alternatives to the PIT reforms. However, its efforts were largely ignored or rejected.<sup>243</sup>
348. Any discussion of public purpose will inevitably implicate notions of proportionality. In this connection, the Majority of the Tribunal has been persuaded that Hungary's PIT

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<sup>238</sup> See also Tr. Day 2, 461:2-462:12 ([REDACTED] Cross-Examination).

<sup>239</sup> Cl. PHB, paras. 91-93.

<sup>240</sup> See Tr. Day 2, 327:6-11; 349:4-7 ([REDACTED] Cross-Examination) (noting that [REDACTED] joined the reform efforts in February, 2011, after the Government had already decided to create the SZEP Card); Tr. Day 2, 490:4-19 ([REDACTED] Cross-Examination) (stating that [REDACTED] was appointed [REDACTED] in October 2011 with the mandate to turn the Erzsébet voucher into a reality, the decision already having been made to launch it).

<sup>241</sup> See Cl. PHB, paras. 81-88.

<sup>242</sup> Id.

<sup>243</sup> See Cl. Mem., paras. 145-165.

reforms were not proportional to the ends, belying its claim that the reforms were enacted for a public purpose, and rendering the expropriation unlawful.

349. As noted above, Respondent has set forth a public purpose for its PIT reforms. Hungary argues that the reforms were justified in order to fulfill these stated objectives: to guarantee that SZÉP Card issuers had experience and presence in Hungary, to fight corruption, to reduce customer fees, to expand tourism, and to support healthy eating.
350. Based on the stringent conditions for SZÉP Card issuers set in Section 13 of the SZÉP Decree,<sup>244</sup> reproduced above, only three banks qualified to issue the SZÉP Card: OTP, K&H, and MKB. When it enacted the SZÉP Decree, Hungary knew that only these three entities would meet its criteria.<sup>245</sup> SPI, Edenred and Chèque Dejeuner, the three French issuers who had 85% of the voucher issuance market share at the time of the SZÉP Decree, did not meet the Decree's criteria.<sup>246</sup>
351. As noted, Hungary does not deny that its reforms resulted in limiting the SZÉP Card issuers to these three banks, but argues that such limitation was justified in light of the stated social purpose.
352. The record seems to suggest otherwise, however. As an initial matter, the Hungarian government had a financial interest in at least two of the SZÉP Card issuers, which continued to increase while the entities came to dominate the voucher market. The Hungarian state has had a 5.12% stake in OTP and 100% stake in MKB since September 29, 2014.<sup>247</sup>

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<sup>244</sup> See Government Decree 55/2011 (IV. 12.) on the Rules of Issuance and Use of the Széchenyi Recreation Card, in force as of April 13, 2011 (RL-0063).

<sup>245</sup> See Tr. Day 2, 453:22 (██████████ Cross-Examination).

<sup>246</sup> RfA, para. 58.

<sup>247</sup> Memorial, para. 81.

353. Second, Hungarian officials involved in the SZÉP Card reforms later became executives of these financial institutions. In March 2016, [REDACTED], a witness at the hearings in this arbitration who was in charge of the SZÉP Card regulations, became [REDACTED], the entity that issues SZÉP Cards.<sup>248</sup> A colleague with whom he had drafted the SZÉP reforms is now MKB's Chief operating officer.<sup>249</sup>
354. Respondent states that MKB was solely German-owned from 2010 to 2014, and K&H was and remains a Belgian bank. As of December 2011, 62.5% of OTP's shareholders were foreign individuals.<sup>250</sup>
355. However, it is telling that the Hungarian government chose to limit SZÉP Card issuers to three financial institutions in which it had financial and other interests while excluding entities who had 85% of the voucher market and in whom it had no financial interest.
356. Hungary then increased barriers to market entry to exclude issuers other than its three chosen financial institutions. Hungary amended the SZÉP Decree on June 16, 2011, to limit the commissions that SZÉP Card issuers could charge hotel merchants, and that hotel merchants could charge other merchants providing ancillary services such as restaurant services.<sup>251</sup> Claimant argues that these limits constituted an additional barrier to market entry because only entities that could depend on other lines of business could afford to issue the SZÉP Card.<sup>252</sup>
357. It is unclear to the Majority of the Tribunal how these amendments served Hungary's stated public purpose. Hungary's stated social purpose was not supported by the justification and enactment of the reforms mandated by the SZÉP Decree.

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<sup>248</sup> Tr. Day 2, 305:16-306:9 ([REDACTED] Cross)

<sup>249</sup> Tr. Day 2, 306:10-18 ([REDACTED] Cross)

<sup>250</sup> Resp. C-Mem., para. 82.

<sup>251</sup> Cl. Mem., para. 83.

<sup>252</sup> Cl. Mem., para. 85; Resp. C-Mem., paras. 81-82.

358. The Tribunal again notes that Hungary has not explained why it was necessary to have only three pre-chosen institutions issue the SZÉP Card, nor why the SZÉP Decree's issuance requirements should be considered necessary and proportionate in respect of Hungary's stated goal to protect consumers and creditors.
359. Hungary has not presented any evidence that it considered alternatives, such as establishing a system for supervising voucher issuers or creating a bank guarantee mechanism. Hungary has not justified why it had to create a state monopoly on vouchers—or give state vouchers any preferential tax treatment at all—in order to achieve its stated public purpose.
360. Respondent argues that reforms were made for a social purpose because a charitable foundation issued the SZÉP Card. The fact that a charitable foundation benefitted from the reforms does not change the fact that SPI was dispossessed of its investment as a result of the reforms.
361. As the *Edenred v. Hungary* tribunal notes, deciding otherwise would open the floodgates for others to expropriate via non-profit public agencies.<sup>253</sup> Although this Tribunal does not rely on the *Edenred* decision in reaching its conclusion, it shares that tribunal's concerns that to consider reforms acceptable merely because they benefitted a charitable foundation would open the door for unlawful expropriation by other states.
362. On balance, the Majority of the Tribunal finds that Hungary's reforms were not made for a public purpose. Hungary has not adequately explained how the SZÉP and Erszébet programs and related reforms further any of Hungary's stated public purposes. The words and actions of Hungarian officials show that the measures were not aimed at any legitimate societal goal, but rather were intended to keep foreign voucher issuers out of the market, particularly French issuers who had previously dominated that market.

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<sup>253</sup> *Edenred v. Hungary*, paras. 411-12.

## (2) Discrimination

363. While Claimant and Respondent discuss “discrimination,” neither side seems to offer a clear definition of it.
364. Respondent argues that a finding of discrimination requires the Tribunal to find discrimination against this Claimant specifically. Under this narrow standard, it is unlikely that discrimination occurred, as nothing in the record points to singling out of Claimant specifically.
365. Claimant notes that neither the BIT nor the relevant arbitral awards explicitly defines “discriminatory.” However, tax measures may not be arbitrary, discriminatory, confiscatory, or abusive. Claimant asks the Tribunal to consider the intent and effect of the tax measure in question when determining whether that measure is discriminatory. An abusive tax measure would be one that is “crafted to force abandonment of a business enterprise by ruining its economic value, or to provide an investor’s competitors with a beneficial fiscal framework that permits more favorable competition.”<sup>254</sup> According to Claimant, to qualify as an expropriation, a tax measure must also substantially deprive the investor of its use and enjoyment of the investment.<sup>255</sup>
366. Claimant and Respondent agree that no definitive requirements exist to determine whether *bona fide* tax reforms are discriminatory. Claimant and Respondent further agree that tax measures may not be illegitimate or abusive. Under the BIT’s provisions regarding expropriation, a state cannot undertake abusive or illegitimate measures that interfere with a distinct property right, and that substantially deprive an investor of the use or control of its investment.<sup>256</sup>

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<sup>254</sup> Cl. PHB, para. 17, citing W.W. Park, *Arbitrability and Tax*, in L. Mistelis and S. Brekoulakis (eds.), *Arbitrability: International And Comparative Perspectives*, 179-205 (2009), Kluwer Law International, paras. 10-21 (CL-0080).

<sup>255</sup> Cl. PHB, para. 18.

<sup>256</sup> Resp. PHB, para. 62.



367. Respondent asserts that, generally, a state may adopt *bona fide* measures (1) for the public interest (2) that are non-discriminatory and (3) do not contravene any specific undertaking.<sup>257</sup> By Respondent's reading of relevant prior awards, normal tax policies, practices of revenue generation, or shifting normal fiscal burden have not been likely to result in liability.<sup>258</sup> Respondent thus notes a presumption of deference to the state by previous tribunals.<sup>259</sup>
368. Respondent argues that if its tax reforms were not *bona fide*, and even if they were discriminatory, these measures would not necessarily equate to expropriation under the BIT or international law.<sup>260</sup> To be expropriatory, the measures must have interfered with a distinct property right, and the investor must have been dispossessed of the investment. Respondent asserts that the Tribunal must make a fact-intensive inquiry to determine whether the tax reforms were illegitimate or abusive, and therefore discriminatory.<sup>261</sup>
369. Without a clear definition of "discrimination," Respondent argues that the term must be viewed in the context of the PIT reforms.<sup>262</sup> In this context, "discrimination does not mean differentiating between two taxpayers or products," since all tax measures necessarily differentiate between taxpayers or products.<sup>263</sup> In a situation where a disparate impact falls upon different actors, a claimant will face difficulty demonstrating improper discrimination.<sup>264</sup>

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<sup>257</sup> Resp. PHB, para. ¶61.

<sup>258</sup> Resp. PHB, para. 66.

<sup>259</sup> Resp. PHB, para. 65.

<sup>260</sup> Resp. PHB, para. 69.

<sup>261</sup> Resp. PHB, para. 64.

<sup>262</sup> Resp. PHB, para. 41.

<sup>263</sup> Resp. PHB, para. 41.

<sup>264</sup> Resp. PHB, para. 41, citing United Nations Conference on Trade and Development, *Expropriation a Sequel*, UNCTAD Series on Issues in International Investment Agreements II, at 96, UNCTAD/DIAE/IA/2011/7, U.N. Sales No. E.12.II.D.7 (2012) (RL-0151). The passage further provides that discrimination covers racial, religious, ethnic and other types of discrimination prohibited under customary international law, but these concerns are not alleged to be at issue here. See also *Link-Trading Joint Stock Company v. Department for Customs Control of the Republic of Moldova*, UNCITRAL, Final Award (April 18, 2002), para. 69 (changes to the annually amended annual budget were

370. Claimant argues that the SZÉP Decree and subsequent creation of the SZÉP Card and Erszébet voucher had the effect of creating a new market framework that favored its competitors, to the point that its investments lost their value and it was forced to close SPH. These effects made the reforms discriminatory and abusive.
371. Claimant points to the CJEU case *Commission v. Hungary*, as did the *Edenred v. Hungary* tribunal, when asserting that the reforms were discriminatory. The CJEU ruled that Erszébet and SZÉP Card regulations were disproportionate, discriminatory, and not justified by the public interest, and therefore unlawful.<sup>265</sup> The CJEU found that the same meal voucher programs considered in this arbitration indirectly discriminated against non-Hungarian EU nationals, thereby violating the freedom of establishment and freedom to provide services that are guaranteed by EU law.<sup>266</sup>
372. The Tribunal acknowledges, as Respondent argues, that CJEU proceedings involve different issues than the BIT, and a violation of EU law does not necessarily mean a BIT violation.<sup>267</sup> However, since the issues in the CJEU case are substantially related to this one, the Majority of the Tribunal considers the CJEU case as probative in its analysis.
373. In its post-hearing brief, the Tribunal asked Claimant to clarify how Hungary might have permissibly regulated the voucher market. For example, the Tribunal asked whether Hungary could have entirely eliminated the tax benefit granted to hot and cold meal vouchers, or regulated the commissions of employers and affiliates. Claimant replied that Hungary could have lawfully adopted measures that equally affected every voucher issuer. For example, elimination of all tax benefits for meal vouchers, or limiting commission levels, could have been legal regulations. Such hypothetical changes to the voucher system

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not arbitrary or discriminatory because they were of general application and not directed specifically at the claimant) (RL-0021).

<sup>265</sup> Cl. PHB, para. 19.

<sup>266</sup> Cl. PHB, para. 20.

<sup>267</sup> Resp. PHB, para. 70.

would have been non-discriminatory and had a public purpose that was proportional to Hungary's stated aims.<sup>268</sup>

374. The Parties dispute the nature and truthfulness of Claimant's claim of discrimination. In its post-hearing brief, Claimant clarified that the gravamen of its claim is that the post-2010 voucher reforms were driven by Hungary's improper intent to replace the French issuers with state-selected issuers. Hungary's subsequent tax reforms were discriminatory and were not justified by a proven public purpose nor proportionate to Hungary's stated goals.<sup>269</sup>
375. Respondent asserts that Claimant's argument is inconsistent. According to Respondent, Claimant has never explained why it disputes only the challenged reforms but not the 2010 reforms. In Hungary's view, Claimant seems to say that the 2012 measures had a more significant impact, but that the 2010 reforms were not discriminatory. According to Claimant's explanation of the gravamen of its claim, both should have been problematic.<sup>270</sup>
376. Moreover, Respondent argues that Claimant's assertions of discrimination primarily involve nationality-based discrimination. Respondent notes that the measures at issue applied to all Hungarian taxpayers equally, not just to Claimant or foreign investors. Therefore, Respondent contends the measures cannot be said to discriminate against foreigners.
377. On balance, the Majority of the Tribunal finds that the PIT reforms were discriminatory, rendering the expropriation unlawful. Hungary's PIT reforms had the effect of narrowing the entities that could issue the SZÉP card and Erszébet vouchers, limiting them to state-chosen or state-owned institutions.
378. Hungary offered no satisfying justification for how these reforms achieved a public purpose, or why it was necessary to exclude those issuers who had previously dominated

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<sup>268</sup> Cl. PHB, para. 21.

<sup>269</sup> Cl. PHB, para. 22.

<sup>270</sup> Resp. PHB, paras. 78-85.

the voucher market. Thus, the Tribunal Majority concludes that Hungary's PIT reforms engaged in expropriation in a discriminatory fashion, with the result of taking property of foreign voucher issuers such as Claimant.

**a. Note on *Edenred v. Hungary* and *UP v. Hungary* Awards**

379. Before leaving its analysis of liability, the Majority of the Tribunal would add that its conclusion finds full consistency with the decisions reached in *Edenred v. Hungary* and the *UP v. Hungary* case referred to above, also referred to as *Chèque Déjeuner Holding Internationale v. Hungary*.

380. These two major arbitrations involve other French voucher issuers. Like those tribunals, the Majority in this arbitration finds that Hungary's PIT reforms unlawfully and indirectly expropriated Claimant's investment.

381. This Tribunal did not rely on those two awards in its analysis, but mentions them here only to note in passing that similar conclusions about Hungary's conduct have been adopted elsewhere.

**IX. LEGAL STANDARDS FOR COMPENSATION**

**A. OVERVIEW**

382. Article 5(2) of the BIT sets forth the standard for compensation in expropriations to include “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.” Moreover, such compensation must “be payable to investors in convertible funds” and “be freely transferable.” Compensation shall be paid “promptly starting from the date of dispossession, failing which, interest calculated at the applicable market rate shall be charged up to the date of payment.”

383. The BIT does not specify whether this standard applies to lawful expropriations, unlawful expropriations, or both. This lack of specificity appears inconsequential in the current case. Standards of customary international law leads to identical consequences in this case.

384. In the absence of a BIT provision on compensation in the case of unlawful expropriation, the Tribunal must look to principles of international law, as provided for in Article 9(3) of the BIT, which states: “[t]he arbitral tribunal shall rule in accordance with the dispositions of this Agreement and the rules and principles of international law.”<sup>271</sup>
385. As elaborated more fully below, under the *Chorzów Factory* principle, full reparation should be provided for unlawful acts of states, as far as possible eliminating the consequences of the illegal act and re-establishing the situation which would likely have existed if that act had not been committed.<sup>272</sup>
386. This principle is echoed in Article 31 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (Draft Articles),<sup>273</sup> as well as Article 34 of the Draft Articles which provides that full reparation can take the form of “restitution, compensation and satisfaction, either singly or in combination.”<sup>274</sup> These Articles commend themselves as a widely recognized appropriate legal standard of relief.<sup>275</sup> Of the forms of full reparation indicated at Article 34 of the Draft Articles, compensation presents itself as appropriate in the present case.

## **B. VALUATION METHODS**

387. Article 5(2) of the BIT incorporates what has sometimes been called the “Hull formula” for compensation, requiring prompt, adequate, and effective payment.

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<sup>271</sup> BIT, Article 9(3).

<sup>272</sup> Cl. Mem., para. 316, citing *Case concerning the Factory at Chorzów*, Merits Judgment No. 13, 13 September 1928, Collection of Judgments: Permanent Court of International Justice, p. 47 (CL-0105); Reply, para. 293.

<sup>273</sup> Article 31 of International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, United Nations (2001) (CL-0049).

<sup>274</sup> Mem., para. 317, citing Article 34 of International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, United Nations (2001) (CL-0049).

<sup>275</sup> See, e.g., *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), para. 87 (CL-0106). See also: *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Award (12 May 2005), para. 406 (CL-0107).

388. “Adequate” compensation should be assessed on the fair market value of the expropriated investment.<sup>276</sup>
389. The BIT’s reference to “real value” thus is equivalent to the concept of “fair market value.” Fair market value is the estimated amount that a willing buyer would pay a willing seller on the valuation date, in an arm’s-length transaction after proper marketing, when each of the Parties acted knowledgeably, prudently, and without compulsion.
390. The valuation date of 31 December 2011, noted by Claimant, constitutes the time when the measures “first crossed the line and took on their expropriatory character.” Consequently, Hungary’s measures crystallized into an expropriation on 1 January 2012.<sup>277</sup>
391. To comply with the principle of full compensation, investments with a proven record of profitability, or “going concerns,” would be valued on the basis of the Discounted Cash Flow (DCF) methodology. The DCF method involves projecting the future cash flows that the business would have generated but for the host state’s conduct, deducting expected cash expenditures for each year, and then factoring in risks by discounting the resulting net cash flows to the date of valuation. This method yields the present value of an investment’s future cash flows.
392. Given that SPH was a going concern active in the Hungarian market from 1993 until its closure, the Tribunal finds that Fair Market Value calculated using Discounted Cash Flow must be the appropriate valuation standard.

### **C. ANALYTIC FRAMEWORK**

393. The Majority of the Tribunal finds that expropriatory conduct must be considered *en bloc*, not by distinguishing and selecting specific elements of such conduct. The “but-for” scenario should assume away the unlawful conduct in its entirety. A but-for scenario should

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<sup>276</sup> World Bank Group, *Guidelines on the Treatment of Foreign Direct Investment*, p. 6, available at <http://italaw.com/documents/WorldBank.pdf>.

<sup>277</sup> Cl. Mem., para. 323

assume away the unlawful conduct without replacing it with hypothetical scenarios resulting from conduct the state could have taken instead of the expropriatory measures.

394. In the present case, while the introduction of the New Products cannot *per se* be considered unlawful, such a measure becomes unlawful in light of the tax regime and of the requirements for issuing the New Products. The Tribunal finds it difficult to assume that four new competitors would have entered the market in the absence of the favorable tax treatment.
395. The state's unlawful conduct consists in the introduction not only of a tax regime applicable to the New Products that put Claimant at a competitive disadvantage, but also of rules on the access to the market of the New Products that excluded Claimant and limited access to specific entities related to the state. These measures must also be assumed away as part of the unlawful conduct of the state.
396. Moreover, had Claimant had access to the market of the New Products, its value might, indeed, have been diminished as a consequence of increased competition. However, Claimant was prevented from entering that market as a consequence of the challenged reforms.
397. It is difficult to assume that Claimant would have suffered from the competition of new entrants regardless of the overall regime introduced by the state, including the preferential tax treatment, the creation of the New Products, and new rules restricting the access to the voucher market.
398. Thus, the Majority of the Tribunal accepts the paradigm presented by Claimant (known as "Claimant's Framework" in the Parties' submissions) for valuation, with quantum determined below. Claimant's Framework assumes that the entirety of the 2012 PIT reforms, including the introduction of the SZÉP card and Erszébet vouchers, constituted a breach of the BIT.

399. Before proceeding, however, the Majority notes that Article 9(3) of the BIT provides that the arbitral tribunal “shall rule in accordance with the dispositions of this Agreement and the rules and principles of international law.”<sup>278</sup>
400. In this connection, the *Chorzów Factory* case, providing a key principle of international law, requires full reparation for unlawful acts of states. Reparation must, as far as possible, “wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.”<sup>279</sup>
401. The *Chorzów Factory* principle has received side recognition as the appropriate legal standard of relief.<sup>280</sup> Likewise, compensation presents itself as the appropriate measure of full reparation among the standards evoked by Article 34 of the Draft Articles on Responsibilities of States for Internationally Wrongful Acts, compensation is the only appropriate one in the present case.

## **X. QUANTUM OF DAMAGES**

### **A. HEADS OF DAMAGES AND ANALYTIC FRAMEWORK**

402. When the Claimant’s Post-Hearing Briefs were filed, Claimant claimed total damages as €78,362,495, comprised as follows, as set forth in paragraph 126(2) and footnote 318 of Claimant’s submission of 12 July 2017:
- €75,527,758 as the “but for” fair market value (if expropriation had not occurred), calculated pursuant to the discounted cash flow;
  - €1,500,000 for restructuring costs

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<sup>278</sup> BIT, Article. 9(3).

<sup>279</sup> Claimant’s Memorial, para. 316, citing *Case concerning the Factory at Chorzów*, Merits Judgment No. 13 (13 September 1928) Collection of Judgments: Permanent Court of International Justice, p. 47 (CL-0105); Cl. Reply, para. 293.

<sup>280</sup> See, e.g., *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), para. 87 (CL-0106). See also: *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Award (12 May 2005), para. 406 (CL-0107).



- €1,353,603 in jointly agreed closure costs.

403. In passing, the Majority notes that breakdown of Claimant’s quantification may not be self-evident. The three items indicated in footnote 318 add to € 78,381,361, rather than €78,362,495, a difference of €18,866. The Tribunal suspects that the difference may derive from a rounding of the restructuring costs.
404. Considering the amount claimed as “but for” value (€ 75,527,758), plus the Experts’ agreement on the amount of closure costs (€ 1,353,603), the subtotal would come to €76,881,361. Subtracting this amount from the total claimed (€78,362,495), it can be inferred that amount claimed as restructuring costs would be €1,481,134.
405. Thus the Majority’s understanding of the relevant figures yields an amount requested of €78,381,361, as totaled in the footnote, rather than the figure indicated in the text which amounts to €78,362,495.
406. For reasons set forth below, the Majority of the Tribunal finds this figure (€78,381,361) to be a reasonable amount to compensate the dispossession of Claimant’s investment, before deduction of SPH’s actual value.
407. Respondent disagrees with those damages, asserting that if the Tribunal finds that the tax regime breached the BIT, but that the introduction of the SZÉP Card and Erzsébet voucher (the “New Products”) did not, Respondent’s experts calculate damages as €19,760,000.
408. Respondent further asserts that if the Tribunal finds that Claimant is not entitled to compensation for the period after the 2017 Tax Amendment, the amount to which Claimant should be entitled should be further reduced to €11,460,000.<sup>281</sup>

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<sup>281</sup> The sums indicated are those contained in Respondent’s Rejoinder. However, in his Second Report, Respondent’s Experts refer to the amount of € 50,540,000 as the compensation to which Claimant would be entitled under its assumption that the but-for scenario should assume away also the introduction of the New Products.

409. As to closure costs, on 3 July 2017, the two sets of experts, [REDACTED] [REDACTED] and [REDACTED] ([REDACTED]), sent to [REDACTED] a letter that was forwarded to the Tribunal, stating that both experts confirm that “*if* (emphasis added) Claimant is entitled to claim its closure costs, the amount of HUF 425,234,451 or €1,353,603 as set out below [in two jointly agreed tables] is reasonable.”<sup>282</sup>
410. Notwithstanding the experts’ agreement on the figure, provided only *if* closure costs are to be awarded, the Parties diverge on the entitlement. Claimant argues that the PIT reforms caused closure, while Respondent contends that Claimant had other businesses besides the vouchers and could have stayed open, as did their competitors.
411. Both Parties agree that Fair Market Value (FMV), calculated using the Discounted Cash Flow (DCF) method, is appropriate if damages are to be awarded.<sup>283</sup>
412. The Tribunal must determine quantum by considering *inter alia* the following elements: When did the expropriation take place? What is an appropriate valuation date? When did the expropriation end? Is award of closure costs appropriate? Are consequential damages appropriate? What interest rate should be used?
413. As a matter of principle, the Parties agree on a number of items, as listed below:
- that the compensation to which Claimant is entitled should be such to wipe out all the consequences of the unlawful conduct and re-establish the situation which would have likely existed had it not been for that conduct (full compensation);<sup>284</sup>

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<sup>282</sup> Letter of [REDACTED], 3 July 2017.

<sup>283</sup> Cl. Reply, para. 296.

<sup>284</sup> Claimant states that Article 5.2 of the BIT provides the standard for compensation for lawful expropriation but not for unlawful expropriation. Respondent contends that the standard of compensation of Article 5.2 of the BIT applies regardless of the lawful or unlawful nature of the expropriation. However, it is unclear what consequences the parties draw from this difference in approach. After relying on Article 5.2 of the BIT, Respondent turns immediately to discussing (and contesting) Claimant’s valuation based on the full compensation standard (*see* Respondent’s Rejoinder, paras. 227-234).

- that Fair Market Value (FMV), calculated using the Discounted Cash Flow (DCF) method, is appropriate if damages are to be awarded;<sup>285</sup>
- that the appropriate methodology to evaluate the investment is the Discounted Cash Flow (DCF) as it is appropriate to evaluate a going concern such as SPH and it encompasses regulatory risk inherent to the iterative nature of tax policies;
- that the appropriate measure of compensation is: i) the hypothetical value of SPH as of the Valuation Date (assuming the absence of the expropriatory measures) minus ii) the actual value of SPH after the unlawful measures;<sup>286</sup>
- that 31 December 2011 would be an appropriate Valuation Date;
- that the “but-for” value is the value of SPH before the alleged breach and the “actual value” is the value of SPH after the alleged breach.<sup>287</sup>

## **B. THE PARTIES’ FRAMEWORKS**

414. The Parties disagree over whether the introduction of the New Products can be separated from the tax regime.
415. Claimant contends that the introduction of the New Products cannot be separated from their tax regime. Hungary’s conduct must be taken as a whole. The drafters of the reform themselves considered the introduction of the New Products and their tax advantages as a package.<sup>288</sup> It would be speculative to assume what measures Hungary would have taken in the absence of the expropriatory measures, notably whether Hungary would have introduced the New Products even without their tax advantages.

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<sup>285</sup> Cl. Reply, para. 296.

<sup>286</sup> Cl. PHB, para. 110.

<sup>287</sup> Claimant’s Pre-Hearing Skeleton, para. 82.

<sup>288</sup> Claimant’s Pre-Hearing Skeleton, para. 78.

416. Claimant further argues that no evidence supports the idea that the SZÉP cards and Erzsébet vouchers would have been able to enter the voucher market in the absence of the preferential tax treatment. No player had ever been able to gain a meaningful market share without being granted a preferential tax treatment.<sup>289</sup> The entities that entered the market after the reform had not done so before and did so precisely because of the favorable tax regime they could enjoy. Given the strong position of the three French issuers, it would have been impossible for competitors to enter the market and gain market share without the discriminatory tax regime.
417. Furthermore, Claimant attests that no evidence exists that Hungary considered introducing the vouchers with equal tax treatment.<sup>290</sup> The SZÉP cards and Erzsébet vouchers were consistently discussed by Hungarian politicians only in the context of the PIT reforms, or in the context of an overall plan to reform the voucher market.
418. Claimant argues that [REDACTED], Respondent's experts, provide purely speculative projections of the effect that these new products would have had on SPH's bottom line<sup>291</sup> While valuation is not an exact science, Claimants argue that appropriate valuation cannot rest on such speculation.
419. Claimant's expert [REDACTED] computes the expected free cash flows after-tax over the forecast period of SPH's 2011 Business Plan on the basis of the EBIT projections, depreciation, and amortization and capital expenditure projections therein.<sup>292</sup> He adjusts the Business Plan to carve out the value of SPH's remaining International Production activity, which was unaffected by the PIT reforms. He then assesses the terminal value of future cash flows into perpetuity, discounting them at the weighted average cost of capital (WACC) as of 31 December 2011, of 13%.

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<sup>289</sup> [REDACTED] Rebuttal Expert Report, paras. 2.26-2.27.

<sup>290</sup> Claimant's Pre-Hearing Skeleton, para. 77.

<sup>291</sup> Claimant's Pre-Hearing Skeleton, para. 79.

<sup>292</sup> Cl. Mem., para. 343

420. Claimant's expert had determined that a market approach to valuation was inappropriate due to lack of publicly available figures on comparable competitors to SPH. However, he cross-checked his valuation against historical Enterprise Value multiples for Edenred SA, the only comparable public company in the Hungarian meal voucher market. Claimant's expert noted that Edenred is a global group, unlike SPH, and therefore does not form an ideal basis for the use of the market approach to valuation. As a cross-check, however, he determined that Edenred's multiples were higher, suggesting that his valuation of SPH is conservative.<sup>293</sup>
421. Claimant's expert determined that SPH's other non-voucher business lines were marginal and could not sustain SPH alone, so he did not further specify deductions from the valuation for these businesses, other than an "Other Income" line.<sup>294</sup>
422. Respondent argues that Claimant's claim relates to the tax regime introduced by the reforms, absent which there would be no arguable claim. It argues that the allegedly unlawful tax regime of the New Products can be dissociated from their introduction (which cannot be considered unlawful). Even without considering the tax advantages, the mere introduction of such products would have resulted in increased competition and in a corresponding reduction of Claimant's market share.
423. Further, Respondent argues that the but for valuation of SPH must consider a scenario on which SPH's voucher products are competing with the SZÉP cards and Erzsébet vouchers, with all voucher products being taxed equally. Respondent says that the SZÉP cards and Erzsébet vouchers would have been able to enter the market and acquire market share without preferential tax treatment. Respondent asserts that the New Products would be competitive and attractive to consumers because of the SZÉP cards' commission structure, the Erzsébet vouchers' charitable purpose, the pre-existing corporate and merchant relationships of the SZÉP issuers and the MNÜA that would facilitate the creation of client

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<sup>293</sup> Cl. Mem., para. 343

<sup>294</sup> Cl. Mem., para. 344.

and affiliate networks, and trends supporting the transition to electronic payments in Hungary that would favor SZÉP.<sup>295</sup>

424. Because of these differences, Claimant and Respondent present two different “Frameworks” for the Tribunal to evaluate when conducting valuation.
425. The “Claimant’s Framework” presents a “but for” scenario that assumes away the PIT reforms and the New Products in their entirety. According to this framework, but for the PIT reforms, which granted the New Products an inherent competitive advantage, the New Products could not have gained any material market share in the established meal voucher market.
426. The “Respondent’s Framework” presents a scenario that assumes away only the differential tax component of the 2012 reforms while incorporating the New Products into the market. Respondent argues that only the alleged expropriatory breaches should be assumed away, but not the introduction of the new products. The introduction of the New Products should be assumed in the but for scenario, but without the preferential tax treatment relative to SPH’s products.
427. The Majority of the Tribunal finds Claimant’s “but for” scenario more compelling. In making its evaluation, the Majority must assume away the PIT reforms and the New Products in their entirety. But for the PIT reforms, which granted the New Products an inherent competitive advantage, the New Products could not have gained any material market share in the established meal voucher market.

### **C. COMMISSION RATES**

428. The Parties also differ regarding appropriate commission rates to be applied. Claimant assumes economic growth, since at the time of the reform, Hungary was coming out of a recession. Claimant thus assumes increased employment and higher volumes of commissions. Even if commission rates fell, Claimant argues that this would be

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<sup>295</sup> [REDACTED] Second Expert Report, paras. 46-64.

compensated by increased sales volumes. Moreover, Claimant's Expert notes that, despite the increase in voucher taxation in 2010, 2011 and 2012, vouchers remained more favorably taxed than salary. Therefore, market contraction should not be assumed. Claimant's expert further assumes stable commission rates.

429. In Claimant's 2011 Business Plan, client commissions are flat at 2% over the period. Claimant's expert characterizes this forecast as based on "conservative" assumptions.<sup>296</sup> Claimant's expert relies on Management's assumption that client commissions would remain stable at 2% of BVI from FY11 going forward, and that affiliate commissions would decrease from 3.5% of BVI in FY11 to 3.1% of BVI in FY14 and remain stable thereafter.<sup>297</sup> Claimant's expert notes that BVI and commission rates are intertwined because commission revenue is driven by BVI and the commission rate.<sup>298</sup> Claimant's expert further notes that the commission rate is consistent with the competition because it corresponds to Erzsébet's commission rate.<sup>299</sup>
430. However, Claimant's 2010-2013 Strategic Plan notes a falling trend in client commissions prior to 2010.<sup>300</sup>
431. Respondent assumes market contraction resulting from removal of the preferential tax treatment of vouchers as from 2010 (*i.e.* two years prior to the valuation date) and reduced personal income tax burden on salaries (which increases the relative attractiveness of salary compensation). Respondent's experts, [REDACTED], further assumes reduction of Claimant's commission from 2% to 1.5 % in the period 2012-2016 on the basis of historic trends.

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<sup>296</sup> [REDACTED] Rebuttal Expert Report, paras. 4.16, 4.32

<sup>297</sup> [REDACTED] Rebuttal Expert Report, para. 4.3

<sup>298</sup> [REDACTED] Rebuttal Expert Report, para. 4.11

<sup>299</sup> [REDACTED] Rebuttal Expert Report, para. 4.11

<sup>300</sup> Exhibit R-0081, Slide 31.

432. Respondent argues that client and affiliate commissions are distinct revenue streams, arising from two different stakeholders, and should be considered separately when modeling SPH's commission revenue.<sup>301</sup>
433. Respondent asserts that SPH's client commissions had been declining for several years before the valuation date, and that BP11 ignores trends in client commissions. Respondent further asserts that SPH's competitors expected downward pressure on client commission rates.<sup>302</sup>
434. Claimant argues that Respondent's experts' projection of market contraction is flawed due to reliance on improper or outdated data and assumptions about market conditions, and because Respondent did not consider Hungary's improving economic circumstances.<sup>303</sup>
435. The Tribunal finds no reason to assume that the voucher market would contract.
436. General economic trends and Hungary-specific economic indicators show that in the post-2012 period no market contraction could be anticipated.
437. Moreover, the reforms undertaken by Hungary since 2010 show the intention was to sustain and expand the vouchers system, not to challenge it. Therefore, the Majority of the Tribunal does not find it appropriate to assume market contraction.
438. Nothing in the Respondent's experts' report seems to support the existence of a trend towards a decrease of commission rates. In any case, even assuming such a trend, this would be compensated by market growth.
439. The Tribunal finds that Claimant's expert's figures for commission revenues can therefore be considered accurate.

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<sup>301</sup> [REDACTED] Second Expert Report, paras. 119-131

<sup>302</sup> [REDACTED] Second Expert Report, para. 129.

<sup>303</sup> Cl. PHB, paras. 119, 121. Claimant further notes Respondent relied on SPH's 2009 strategic plan, and at the hearing, Respondent's experts chose to rely on SPH's 2010 Strategic Plan and the market risks therein, ignoring the 2011 strategic plan, and therefore the impact of the 2011 reform on perceived risk. Cl. PHB, para. 122.



**D. DISCOUNT RATE**

440. Claimant's expert assumes a 13% discount rate. This rate considers market instability and country risk. Claimant's expert states that no additional risk should be imputed to market instability because a notional buyer would not have considered the risk of the government granting a competitive advantage to a new entrant.
441. Respondent's experts generally agree with the Claimant's expert's approach to calculating the discount rate. However, Respondent's experts add a 2% discount for market instability, including additional risk and uncertainty as to the future tax treatment of vouchers in the wake of the 2010 and 2011 reforms.<sup>304</sup> This would mean a 15% discount.
442. Applying "Respondent's Framework" for damages, discussed above, Respondent's experts had added a 1% discount for country risk, amounting to a total discount rate of 16%. This view takes into consideration higher volatility deriving from the entry of four new competitors into the market, and the risk of market contraction from increased tax rates for vouchers. Because the Majority has already rejected "Respondent's Framework," as discussed above, it also rejects adding a corresponding 1% to the discount rate.
443. Claimant argues that Respondent's experts' calculation of an additional 2% premium is flawed because the experts themselves admitted that the "number was neither substantiated with reference to any report nor based on any mathematical calculation."<sup>305</sup> Claimant asserts that its expert's 13% discount rate already includes an appropriate country risk premium accounting for market-specific risk.<sup>306</sup>
444. The Tribunal finds a 13% discount rate to be appropriate.
445. When SPH made its Strategic Plan for 2010-2013, it could not have known that Hungary's PIT reforms would occur. However, it accounted for uncertainty relating to the election of

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<sup>304</sup> [REDACTED] Second Expert Report, para. 148

<sup>305</sup> Cl. PHB, para. 120, citing Tr. Day 3, 723:5-724:9 ([REDACTED] Cross-Examination).

<sup>306</sup> Cl. PHB, para. 120, citing [REDACTED] Rebuttal Expert Report, para. 4.76

the new Fidesz government. SPH's 2010-2013 Strategic Plan is dated 14-16 April 2010.<sup>307</sup> The plan notes some political uncertainty because Fidesz won the first round of parliamentary elections on 11 April 2010, and the second round of elections were to be held on 25 April 2010.<sup>308</sup> The plan notes that no concrete messaging had been done on the meal voucher topic, and that changing the voucher framework positively might actually be good for Fidesz.<sup>309</sup>

446. While the risk to the meal voucher framework based on the Fidesz election thus remained unclear, the plan does note that the "Position of FIDESZ government after election will be decisive."<sup>310</sup> The Strategic Plan thus anticipates that additional reforms might occur.
447. The 2010-2013 Strategic Plan anticipated that food and meal vouchers might be separated and risks in sustainability and business might result.<sup>311</sup> The 2010-2013 Strategic plan also discusses the PIT reforms that the government had previously introduced and their effects on the voucher market. The Strategic Plan thus assumes increased market instability specific to the voucher market.
448. SPH's Strategic Plan 2010-2013, together with its Budget Plan, thus represent a realistic scenario of what a notional buyer would have considered when determining whether to buy SPH, assuming away the reforms. Without the reforms, the market uncertainty due to the 2010-2011 reforms which caused Respondent to raise the discount rate would not have existed.
449. The Majority of the Tribunal finds that Claimant's expert adequately considered the potential increased volatility of the legal environment when calculating a discount rate that accounted for market risk.

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<sup>307</sup> Exhibit R-0081, SPH's Strategic Plan 2010-2013 (14-16 April 2010).

<sup>308</sup> Exhibit R-0081, Slide 7.

<sup>309</sup> Id.

<sup>310</sup> Id., at 18.

<sup>311</sup> Id., Slide 9.

450. Thus, the Majority of the Tribunal finds that it would be inappropriate to increase the discount rate by another 2% to account for market uncertainty that would not have existed but for the PIT reforms.

**E. VALUE OF SPH, INCLUDING RESIDUAL VALUE OF PRODUCT LINES**

451. Claimant's expert calculates SPH's actual value after expropriation to be zero, while Respondent's experts assert that SPH has some value, given that SPH had other, non-meal voucher lines of business which were not impacted by the expropriation. In Respondent's view, these other lines could be expected to grow in the future, according to SPH's 2011 Business Plan ("BP2011").<sup>312</sup>

452. Respondent says it remains unable to provide an alternative figure for SPH's value because Claimant's expert did not analyze data regarding SPH's other product lines. However, Respondent's experts' first report and Respondent's Counter-Memorial calculated SPH's actual value to be €6.69 million.<sup>313</sup>

453. In their second report, Respondent's experts calculated SPH's actual value to be €7.58 million, based on SPH's BP2011 which was prepared in May 2011 and taking into account the improved financial performance of the non-meal voucher lines of business after elimination of the meal voucher activities.<sup>314</sup>

454. In the "Joint Quantum Experts Statement Summarizing Areas of Agreement & Disagreement" ("Joint Statement"), sent by Claimant on 31 March 2017, and in its Presentation on Valuation and Damages at the hearing (slides 24 and 27), Respondent's experts further revised SPH's actual value to be €5.5 million. [REDACTED] presented this figure in slide 24 of its "Presentation on Valuation & Damages" at the hearing, which

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<sup>312</sup> Resp. C-Mem., paras. 253-54.

<sup>313</sup> Resp. C-Mem., para. 255; [REDACTED] First Expert Report, paras. 191-192.

<sup>314</sup> [REDACTED] Second Expert Report, paras. 177-178.

calculated the Actual Value of SPH as of 31 December 2011 on an “Ex-Ante Basis” taking into account all facts and circumstances known on the date of the breach.

455. Claimant states that [REDACTED]’s assessment of SPH’s “actual value” captures the value at the moment that the expropriatory measures first crystallized into an expropriation, ignoring the subsequent measures.<sup>315</sup>
456. Claimant and Respondent further disagree on whether the 2017 Tax Reforms, which eliminated preferential tax treatment for the SZÉP and Erszébet vouchers, should impact damages.
457. Claimant argues that SPH was permanently deprived of its leading position on the fringe benefit market. The 2017 Tax Reform does not allow SPH to compete on an even playing field with SZÉP card issuers. SPH will not be able to regain market share from SZÉP issuers, having been permanently deprived of the value of its business to the point of needing to close. It is unlikely that SPH would be able to get back clients it lost as a result of the discriminatory measures that were in place for five years.
458. Respondent argues that Claimant’s loss is not permanent. Because of the 2017 reforms, Respondent believes damages should be limited to lost profits suffered during the period 2012-2016.<sup>316</sup> Respondent asserts that the 2017 tax reforms now enable SPH to compete with the SZÉP card and Erszébet vouchers on an even playing field. According to Respondent, the reforms could have enabled SPH to re-enter the market, like its competitor Edenred. Because SPH can also re-enter the market, SPH’s Actual Value may be positive in the future.<sup>317</sup>

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<sup>315</sup> Cl. PHB, para. 125.

<sup>316</sup> [REDACTED] Second Expert Report, paras. 160-170.

<sup>317</sup> [REDACTED] Second Expert Report, paras. 160-170.

459. Claimant's expert concedes that Claimant's International Production business was not part of Claimant's core business and was not directly impacted by the PIT reforms.<sup>318</sup>
460. Other than the International Production Business, Claimant's expert includes all business lines in his analysis. Claimant asserts that the value of its I&R business lines and Cafeteria services were included in its expert's "Other Revenues" line, and thus were factored into the but for and actual values of SPH.<sup>319</sup>
461. Respondent argues that the value of the un-impacted business lines must be included in the valuation of SPH in the "but-for" and actual scenarios. Both International Production and other non-voucher operations were not impacted by the alleged breaches, according to Respondent, and therefore must be included in the valuation of SPH.<sup>320</sup> This affects Claimant's expropriation claim because the other businesses of SPI in Hungary have an actual value greater than zero.
462. Claimant and Respondent disagree on the EBIT forecasts for the Cafeteria and I&R Services business lines. Claimant asserts that EBIT margins will not continue to improve.<sup>321</sup> Respondent argues that EBIT margins will continue to improve, reaching 35% and 44.2% in FY16 for Cafeteria and I&R Services, respectively, based on SPH's 2011 Business Plan's Cafeteria EBIT of 29% and I&R EBIT of 35% in FY14.<sup>322</sup>
463. Claimant argues that its I&R and Cafeteria businesses are small and only viable as add-ons to its core businesses and that Respondent's experts rely on a cost allocation by business line that was prepared only for analytical purposes.<sup>323</sup>

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<sup>318</sup> [REDACTED] Rebuttal Expert Report, para. 5.15.

<sup>319</sup> [REDACTED] Rebuttal Expert Report, para. 5.7. Cl. Reply, para. 324.

<sup>320</sup> [REDACTED] Second Expert Report, para. 189.

<sup>321</sup> [REDACTED] Rebuttal Expert Report, para. 5.31

<sup>322</sup> [REDACTED] Second Expert Report, Appendix D.1e—Updated.

<sup>323</sup> [REDACTED] Rebuttal Expert Report, paras. 5.33 and 5.52.

464. Respondent asserts that Claimant has not adequately considered the value of its Cafeteria, I&R, and International Production businesses in its valuation calculations.
465. Respondent argues that Claimant's expert has not demonstrated that the Cafeteria, I&R, and International Production business are unprofitable on their own. The 2011 Business Plan indicates that SPH had plans to grow the Cafeteria and I&R lines quickly in the following years.<sup>324</sup> Trends suggest that SPH would be profitable by 2019 and could be profitable even without the losses from the meal voucher business.<sup>325</sup>
466. The Tribunal finds that some value must be imputed to SPH after expropriation.
467. The Tribunal does not question SPI's decision to close operations in Hungary. Claimant has persuasively demonstrated that, after the PIT reforms, SPH had been operating at a loss for several years and that the non-meal voucher lines of business were only ancillary to its core business, *i.e.* the meal voucher activity. The Tribunal has been persuaded that SPH's non-voucher business lines were not viable as stand-alone businesses.
468. Also, the Majority of the Tribunal cannot accept Respondent's argument that the 2016 Tax Reforms would have allowed Claimant to re-enter the market on a level playing field with its competitors. Claimant has plausibly argued that SPH was permanently deprived of the value of its business. The Tribunal finds it unlikely that SPH would have been able to get back clients that it lost as a result of the PIT reforms that had been in place since 2011, and Respondent has not presented any plausible argument to the contrary.
469. However, it is undisputed that the non-meal voucher lines of business (Cafeteria, I&R and International Production) were unaffected by the PIT reforms. Respondent has plausibly argued, and the BP 2011 confirms, that, in 2011, SPH intended to diversify its business and anticipated growth for its non-voucher lines of business. The fact that these lines of

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<sup>324</sup> [REDACTED] First Expert Report, para. 163.

<sup>325</sup> [REDACTED] First Expert Report, para. 163; [REDACTED] Second Expert Report, para. 165.

business were not viable as stand-alone activities in SPH's organization and business case, does not mean that a notional buyer would not have been prepared to buy them.

470. Claimant's expert indicated SPH's actual value to be zero and did not put forward any alternative valuation. As mentioned, Respondent's experts have changed their position twice in this respect. In their first report, they indicated SPH's actual value to be €6.69 million, in their second report €7.58 million, and in Respondent's experts' Presentation on Valuation and Damages at the hearing €5.5 million.
471. Respondent's experts' valuation in their first report<sup>326</sup> refers only to the business lines that were unimpacted by the PIT Reforms and is based on the financial performance of these lines projected in the BP2011. The Tribunal considers the BP2011 as a reliable basis since it was prepared by Claimant itself at a date reasonably close to the Valuation Date.
472. Respondent's experts corrected and increased SPH's actual value in their second report,<sup>327</sup> which is based on the improved financial performance the non-meal voucher lines of business would project after the meal-voucher activities were eliminated.
473. In their Presentation on Valuation and Damages at the hearing and in the Joint Statement, Respondent's experts further corrected and decreased SPH's actual value to be €5.5 million.<sup>328</sup> Respondent's experts explained this correction by reference to the need to take into account the costs of restructuring and downsizing SPH after elimination of the meal voucher line of business. Although Respondent's experts did not present a detailed analysis of the impact of the restructuring costs, the Majority of the Tribunal has been persuaded that their valuation is reasonable and accepts it.
474. The Tribunal will therefore retain Respondent's experts' last valuation and deduct €5.5 million from the amount awarded to Claimant.

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<sup>326</sup> [REDACTED] First Expert Report, para. 189, and Appendix D.

<sup>327</sup> [REDACTED] Second Expert Report, para. 177 and Appendix D.1e - Updated.

<sup>328</sup> Tr., Day 3, pp. 644 and 775-776; [REDACTED] Presentation at Hearing, slide 24.

## **F. CLOSURE COSTS**

475. As noted above, the Parties' experts have agreed that "*if* (emphasis added) Claimant is entitled to claim its closure costs, the amount of HUF 425,234,451 or € 1,353,603 is reasonable."<sup>329</sup>
476. Notwithstanding the experts' agreement on the figure, provided only *if* closure costs are to be awarded, the Parties diverge on the entitlement, as discussed below.
477. Claimant argues that the PIT reforms caused SPH to lose its ability to generate profit and ultimately, to close. Claimant cites SPH's EBIT figures, which have been consistently negative since 2013. Claimant adds that its non-voucher business lines were never intended to be sustained as stand-alone businesses.<sup>330</sup> Therefore, the closure of the voucher activity because of the reforms necessitated the closing of all business in Hungary.
478. Respondent argues that Claimant has not demonstrated that SPH's business is permanently unviable. First, Respondent contends that SPH had other business besides the vouchers and could have stayed open, as did their competitors. Claimant has other lines of business in Hungary, which were unaffected by the challenged reforms. Claimant has not demonstrated that these other lines of business could not have generated revenues.
479. Moreover, as a consequence of the CJEU decision, Respondent has amended the laws challenged by Claimant. Respondent argues that Claimant's meal vouchers will now receive the same tax treatment as the Erszébet Voucher. Therefore, Claimant will be granted full reparation in the form of restitution in-kind, and any compensation by arbitral award would result in double recovery.
480. Finally, Respondent argues that, given the legislative change, Claimant could have re-established its voucher operations in Hungary. Therefore, it is entitled to compensation

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<sup>329</sup> Letter of [REDACTED], 3 July 2017.

<sup>330</sup> Cl. PHB, para. 123.



only for the period 2012-2016. Since the decision to close all operations in Hungary was Claimant's decision, Claimant is not entitled to closure costs.

481. The Tribunal finds an award of closure costs to Claimant appropriate, in the amount of € 1,353,603 agreed upon jointly by both Parties' experts. The closure costs are a consequence of the expropriatory measures. Claimant is therefore entitled to recover them.
482. Claimant has successfully demonstrated that SPH has lost its capacity to generate business, and that the value of its business was destroyed. Since the meal vouchers made up the vast majority of its business, Claimant's decision to close operations in Hungary cannot be questioned.
483. It is undisputed that, as of 2017, to comply with the CJEU decision, Hungary introduced the same tax treatment for meal vouchers and the Erszébet Voucher. However, this change in the tax regime does not wipe out the consequences of the expropriation and the prejudice suffered by Claimant before the adoption of the 2017 measures. Therefore, it cannot be considered restitution in-kind.
484. The 2017 changes to Hungary's tax regime also do not prevent Claimant from projecting lost profit in perpetuity. The effects of expropriation were sufficiently stable that the loss can be considered permanent.
485. Moreover, at the time of the expropriation, Claimant could not have known that, after several years, Hungary would be forced to change the tax framework to give Claimant's vouchers an equal tax treatment to the Erszébet voucher. Claimant could not have been expected to make business decisions based on the hope that Hungary would make such a change, and Claimant cannot expect that such a change will be permanent.
486. However, even if the expropriation caused the closing of all business in Hungary, the fact that Claimant had other lines of business unaffected by the challenged measures means that a notional buyer would have imputed some value to SPH.

**G. CONSEQUENTIAL DAMAGES**

487. It is unclear whether Claimant seeks consequential damages separate from closure costs.
488. In its Memorial on the Merits, Claimants initially sought downsizing costs for redundancies and excess rental costs. According to Claimant, these damages are not covered by fair market valuation of SPH because they were incurred after the valuation date and are not included in projected cash flows.<sup>331</sup>
489. In its Reply on the Merits, Claimant's expert appears to fold consequential damages into closure costs, accounting for the fact that by the time of the Reply, Claimant had closed its Hungarian business. Claimant's new calculation of closure costs includes redundancy costs (HUF 350 million), termination of long-term contracts (HUF 28 million), and miscellaneous costs (HUF 3.5 million). After these new calculations, Claimant's expert arrives at a quantum of the total compensation due to Claimant: HUF 23.8 billion, or EUR 78.2 million.<sup>332</sup>
490. At the time it filed its Post-Hearing Brief, Claimant no longer included a separate head of damages for consequential damages. It sought only to receive the "but-for" fair market value of SPH, restructuring costs, and jointly-agreed closure costs.
491. Respondent argues that Claimant has not proven the alleged losses nor shown that the costs were proximate and foreseeable. According to Respondent, Claimant's only support for these damages is an appendix to [REDACTED] Report citing only SPH Management.<sup>333</sup> SPH's closure costs are speculative because they have not yet been incurred.<sup>334</sup>
492. The additional consequential damages that Claimant sought in its original Memorial on the Merits appear to have been subsumed within its request for closure costs. Since Claimant's

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<sup>331</sup> Cl. Mem., para. 332.

<sup>332</sup> Cl. Reply, paras. 329-330.

<sup>333</sup> Respondent's Pre-Hearing Skeleton, at para. 89.

<sup>334</sup> Respondent's Pre-Hearing Skeleton, para. 89.

Memorial and Reply were filed, the experts have agreed on joint calculations of closure costs. Thus, the Tribunal declines to award consequential damages on top of closure costs.

## **H. INTEREST**

493. Claimant argues that pre-award interest should accrue from the agreed-upon valuation date of 31 December 2011 to the date of the final award, and that post-award interest should accrue from the date of the final award to the date of full payment of the principal sum.<sup>335</sup>
494. According to Claimant, a 12-month EURIBOR rate + 1.75%, compounded annually should be the rate to be applied.<sup>336</sup>
495. Claimant notes that EURIBOR (Euro Interbank Offered Rate) represents a widely accepted reference for setting interest rates in Europe.
496. The spread from EURIBOR is an average applied to intercompany loans within the Sodexo Group between 2011 and August 2015, on an annual basis, fixed for transfer pricing documentation to ensure that these are aligned to market levels over the period.<sup>337</sup>
497. Claimant asserts that interest should be compounded annually, as the rates on intercompany loans are reviewed on an annual basis within the Sodexo Group, reflecting current practice in arbitration and modern economic realities.<sup>338</sup>
498. Respondent does not contest Claimant's arguments regarding interest.
499. The Tribunal considers the above analysis reasonable, and adopts the proposed approach in this Award.

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<sup>335</sup> Cl. Mem., at para. 336

<sup>336</sup> Claimant's Pre-Hearing Skeleton, at para. 86

<sup>337</sup> Cl. Mem., para. 337

<sup>338</sup> Cl. Mem., paras. 338-339

500. Pre-award and post-award interest reflect the time value of money, with post-award interest compensating additional loss incurred from the date of the award to the date of final payment, a principle recognized in international arbitration law and practice.
501. Article 5(2) of the BIT requires the payment of interest “at an appropriate commercial rate” on the principal sum awarded. This is consistent with the well-established principle of international law that interest forms a fundamental component of full compensation.
502. The Tribunal awards pre-and post-award interest compounded annually at the 12-month EURIBOR rate plus 1.75%, running from 31 December 2011 to the date of full payment of the principal sum.<sup>339</sup>

## **XI. MAJORITY OBSERVATIONS ON SEPARATE OPINION OF MR. THOMAS**

503. The Majority has carefully considered the Separate Opinion of our esteemed colleague Christopher Thomas.
504. The Majority agrees with Mr. Thomas that this Tribunal has power to find liability and damages in respect of a dispossession in the sense provided in Article 5(2) of the BIT and arbitrators must respect the shared intent of the Contracting States.
505. In the separate and dissenting opinion, Mr. Thomas states that “I do not think that the discrimination, disproportionality, etc. of the measures gets the Tribunal home on expropriation.”
506. For the sake of good order and the integrity of this Award, the Majority must note that it did not base its finding of indirect expropriation on discrimination or disproportionality *per se*, but rather determined first that an indirect expropriation occurred because the value of the shares was effectively reduced to zero through the PIT reforms.

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<sup>339</sup> Claimant’s Pre-Hearing Skeleton, at para. 336

507. Following its determination of expropriation, the Majority engaged in a discussion of discrimination, to show that the PIT reforms were not *bona fide* regulatory measures, and that the expropriation was unlawful. The majority conducted that analysis according to well-established criteria for determining what regulatory measure prove *bona fide*, and when expropriation proves unlawful.
508. It bears repeating that the Majority determined that an unlawful expropriation occurred, *not* that autonomous grounds for recovery exist by virtue of discrimination, disproportionality and unfair treatment *qua* discrimination, disproportionality and unfair treatment.
509. Because the Majority of the Tribunal finds that Hungary's behaviour constitutes an unlawful expropriation, the Majority finds it unnecessary to analyse whether Hungary's behaviour separately constitutes a dispossession to which Article 5(2) of the BIT refers, assuming that the notion of "dispossession" bears the separate and broader meaning suggested by Mr. Thomas.
510. The Majority of the Tribunal need take no position on whether in the abstract the term "dispossession" in Article 5(2) of the BIT creates a separate and broader category from expropriations and nationalizations and is (as suggested by Mr. Thomas "intended to reach measures that are not expropriations or nationalizations (either direct or indirect)".<sup>340</sup>

## **XII. COSTS**

511. Article 61(2) of the ICSID Convention empowers the Tribunal to assess the expenses incurred by the Parties in connection with the proceedings, and apportion such expenses, as well as the fees and expenses of the members of the Tribunal, and the expenses and charges of the Secretariat, between the Parties.

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<sup>340</sup> Separate Opinion of Christopher Thomas, paras. 57-58.

512. In determining how costs shall be apportioned, Procedural Order No. 1 states that “the Tribunal may assess the reasonableness and proportionality of costs claimed and take into account factors it considers relevant, including the procedural conduct of the Parties and/or their counsel throughout the proceedings. Cost items that may be recoverable include but are not limited to arbitration costs (arbitrators’ fees and ICSID’s administrative costs), lawyers’ fees, and experts’ costs.”<sup>341</sup>
513. On 17 October 2017, each side submitted its request on costs (legal representation and ICSID costs), which for Claimant totaled €4,808,859.12 plus USD 325,000 (with interest compounded annually at the 12-month Euro Interbank Offered (EURIBOR) plus 1.75% from the date of the Award until final payment. For Respondent the analogous amount came to USD 2,345,427.95.
514. 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):

Arbitrators’ fees and expenses	
William W. Park	220,573.91
Andrea Carlevaris	201,243.56
John Christopher Thomas	124,391.76
Jill Goldenziel	58,420.00
ICSID’s administrative fees	138,000.00
Direct expenses	48,584.36
<b>Total</b>	<b><u>791,213.59</u></b>


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<sup>341</sup> Procedural Order no. 1, para. 9.2

515. The above costs have been paid out of the advances made by the Parties in the amount of 799,855.00.<sup>342</sup> The Parties individual shares of the costs of arbitration amount to USD 395,606.79 for SPI and USD 395,606.80 for Hungary.
516. The Tribunal consider that neither side has pursued the claims and/or defenses in bad faith. Difficult questions arose which the arbitrators debated vigorously, and which continued to divide the Tribunal until a common decision was reached on the result, if not the reasoning.
517. Under the circumstances, the Tribunal considers that each side should bear its own costs of legal representation and should bear on a 50/50 basis the costs of the arbitration paid to and through ICSID.

### **XIII. DISPOSITION**

For the foregoing reasons, the Arbitral Tribunal decides as follows:

518. Through unlawful dispossession of Claimant's investment in Hungary, Respondent has breached its obligations under Article 5(2) of the Treaty between the Government of the Republic of France and the Government of the Republic of Hungary Concerning the Encouragement and Reciprocal Protection of Investments, which entered into force on 30 September 1987.
519. In consequence, Claimants are entitled to damages in a principal amount equal to 
520. Interest shall accrue compounded annually at the 12-month EURIBOR rate plus 1.75%, running from 31 December 2011 to the date of full payment of the principal sum.<sup>343</sup>
521. Each side shall bear its own legal expenses, including fees for attorneys and experts.

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<sup>342</sup> The remaining balance will be reimbursed to the parties in proportion to the payments that they advanced to ICSID.

<sup>343</sup> Cl. Mem., at para. 336

522. The costs of arbitration, including the fees of the arbitrators and the administrative expenses of the Centre, shall be divided on an equal (50/50) basis.
523. Any and all other claims heard before the Tribunal are hereby dismissed.





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Andrea Carlevaris  
Arbitrator

Date: 10 January 2019



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J. Christopher Thomas QC  
Arbitrator

Date: 19 January 2019



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William W. Park  
President of the Tribunal

Date: 24 January 2019

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

**SODEXO PASS INTERNATIONAL SAS**

**Claimant**

v.

**REPUBLIC OF HUNGARY**

**Respondent**

ICSID Case No. ARB/14/20

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**Separate and Dissenting Opinion of J. C. Thomas QC**

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**Introduction**

1. I begin by thanking to my colleagues for their patience and collegiality during the course of an extensive exchange of views.
2. This separate opinion focuses on a narrow issue of law. I concur in the result reached by my colleagues, and in their findings on the principal facts, but not with their analysis of breach.
3. I agree with much of what my colleagues have said and in particular their observation that: “*a thin line exists between indirect expropriation and non-expropriatory abusive conduct that has an adverse effect on the economic value of the investment.*”<sup>1</sup> My objective is to attempt to properly situate that line on the facts of this case, having regard to the terms of the Treaty.
4. My concerns are that in finding that SPI suffered an indirect expropriation<sup>2</sup>, the majority has given insufficient weight to both: (i) SPI’s admissions that neither it, nor its Hungarian subsidiary, had any right to a particular taxation treatment of the meal vouchers on which

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<sup>1</sup> Award, ¶ 319.

<sup>2</sup> Award, ¶ 328.

its Hungarian business was based; and (ii) the effect of a judgment of the Court of Justice of the European Union (CJEU) which condemned the same measures as are at issue in this arbitration.

## The Facts

5. [REDACTED]

[REDACTED]

[REDACTED]

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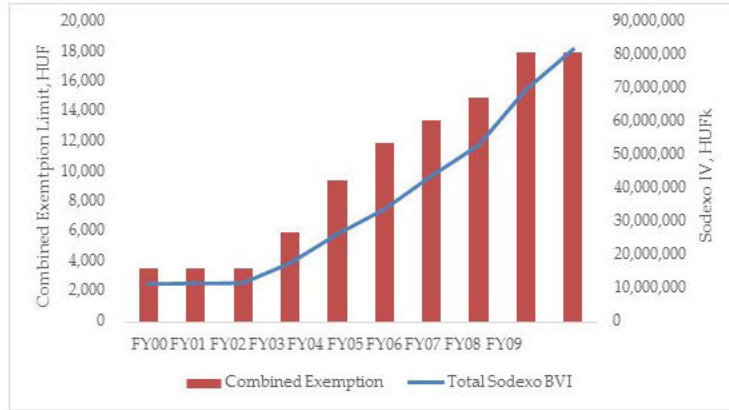
<sup>3</sup> The Claimant acknowledged that its voucher business is derived from a country's tax regime. See its business plans (at Exhibits R-0048 and NAV-0034) which contain references to the Hungarian tax regime and possible changes thereto. (Sodexo's Strategic Plan Hungary, 2009-2012, Paris, 6 May 2009 (Exhibit R-048), slide 2: "The legal situation is unstable, risk of significant reduction of the tax advantages for fringe benefits" [Emphasis in original.]; slide 9: "Strategy [...] implement new services in motivation, not requiring tax advantages & not depending on legal situation"; slide 42: threats included "Risk of tax reform to reduce/cancel fringe benefits".) Hungary's Expert, [REDACTED], showed how reforms to other countries' tax regimes in the United Kingdom and Argentina did away with tax incentives for meal vouchers with a commensurate impact on the providers thereof [REDACTED] First Expert Report, 29 January 2016 [REDACTED] First Expert Report"), pp. 15-17).

<sup>4</sup> [REDACTED] First Expert Report, ¶ 32: [REDACTED]

8.

[REDACTED]

Figure 2: Historic Sodexo Issued Volumes and Tax Cap Increases, FY2000 – FY2001<sup>50</sup>



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

<sup>5</sup> Noted in the First Expert Report of [REDACTED] ("First Expert Report of [REDACTED]").

[REDACTED]

[REDACTED]

[REDACTED]

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<sup>6</sup> Sodexo's Strategic Plan, Hungary, 2009-2012, Paris, 6 May 2009 (Exhibit R-0048), slide 2.

<sup>7</sup> Claimant's Memorial ("Memorial"), ¶ 71 and p. 53, Graph 1.

<sup>8</sup> Deloitte, "Hungary – 2010 Tax Law Changes", *GES NewsFlash*, 3 November 2009 (Exhibit NAV-16).

<sup>9</sup> Ministry for National Economy, "Hungary's flat-rate personal income tax," 16 November 2010, p. 3 (Exhibit NAV-17).

13.



From 2009 onwards, due to the financial crisis and the change in taxation

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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<sup>10</sup> First Expert Report of [REDACTED].

<sup>11</sup> *Id.*, ¶ 5.9.

<sup>12</sup> Memorial, ¶ 65.

<sup>13</sup> Claimant's Reply ("Reply"), ¶ 253.

<sup>14</sup> First Expert Report of [REDACTED].

20.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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<sup>15</sup> Memorial, ¶¶ 72-92; Reply, ¶¶ 35-64, 73-77.

<sup>16</sup> Memorial, ¶¶ 96-103, 129-136; Reply, ¶¶ 65-70, 97-101.

<sup>17</sup> Claimant's Post-Hearing Brief, ¶ 76:

[REDACTED] (Memorial, ¶¶ 95, 107, 135-136, 173-175, 220, 222; Reply, ¶¶ 98, 117, 137-138, 141; Claimant's Post-Hearing Brief, ¶ 75.)

<sup>18</sup> Claimant's Post-Hearing Brief, ¶ 22.



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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<sup>19</sup> Press Release of the European Commission, *November infringements package: main decisions* (21 November 2012), available at [http://europa.eu/rapid/press-release\\_MEMO-12-876\\_en.htm](http://europa.eu/rapid/press-release_MEMO-12-876_en.htm). Cited in the Memorial, at footnote 24; Official Journal of the European Union, Case C-179/14 (30 June 2014) (Exhibit C-0012).

<sup>20</sup> Advocate General Yves Bot's Opinion, *Commission v. Hungary*, Case C-179/14 (17 September 2015) ("AG Bot's Opinion") (CL-0012).

<sup>21</sup> *Id.*, ¶ 245 (Claimant's free translation).

[REDACTED]  
 [REDACTED]  
 [REDACTED]

[REDACTED]

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[REDACTED]  
 [REDACTED]  
 [REDACTED]

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\_\_\_\_\_

<sup>30</sup> *Id.*, ¶¶ 166-172.

30.

[REDACTED]

## The Issue

31. As noted in paragraph 4, I see two weaknesses with labelling what the Respondent did as effecting an *indirect* expropriation. The first weakness is the fact that neither SPI nor its subsidiary had any legal right to a particular taxation treatment of their voucher offerings. SPI freely acknowledged this to be the case:

- “SPI does not claim [...] that it had any ‘contract or any other type of commitment guaranteeing [...] access to a market, market share, a particular volume of business, let alone guaranteed returns.’”<sup>32</sup>
- “Claimant does not allege that it had a vested right to the continuance of certain tax treatment.”<sup>33</sup>
- Indeed, SPI conceded that no expropriation claim would lie if the regime were to be done away with entirely. To be sure, SPI qualified this concession by stating that to constitute a “lawful regulation” the tax benefits would have to be eliminated “entirely” or limited “equally” and such reform would have to be justified by “a proven public purpose that was proportionate to its aims, and not imbued with improper intent against Claimant”.<sup>34</sup> In principle, however, it accepted that it had no legal right to an expectation that the voucher business would continue.

32. My colleagues do not share my view that this weakens the indirect expropriation claim. They consider that SPI’s shareholding in SPH suffices to establish a property right capable

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<sup>31</sup> Reply, ¶ 199.

<sup>32</sup> Reply”, ¶ 253.

<sup>33</sup> Claimant’s Post-Hearing Brief, ¶ 23.

<sup>34</sup> Claimant’s Post-Hearing Brief, ¶ 21: “Had Respondent eliminated the tax benefits granted to meal voucher [*sic*] entirely or elected to regulate all meal voucher issuers equally by limiting commission levels that could be charged to employers and affiliates, and such reform was justified by a proven public purpose that was proportionate to its aims, and not imbued with improper intent against Claimant, it would have been a lawful regulation.” [internal footnote removed].

of supporting a finding of indirect expropriation.<sup>35</sup> They rely upon the CJEU's findings of disproportionality and inadequate justification of the measures in arriving at their finding:

323. In *Commissioner v. Hungary*, the CJEU found that the SZÉP and Erszébet regulations [*sic*] were disproportionate to Hungary's stated aims of protecting users and creditors, not justified by these stated aims, and discriminated against foreign issuers. While the EU regulations at issue in that case differ from the BIT provisions, the CJEU's analysis of discrimination, proportionality, and the alleged public purpose of the tax reforms are highly relevant to this case.<sup>36</sup>

33. I do not think that the CJEU's findings on discrimination and disproportionality, *etc.* gets the Tribunal home on indirect expropriation and I shall seek to explain why I do not agree that proof of ownership of shares suffices to demonstrate an indirect expropriation on the facts of this case.
34. *First*, proof of discriminatory or unjustifiable acts does not convert something that is not an expropriation into an expropriation, even if substantial losses result from such measures.<sup>37</sup> This can be seen in the *Fireman's Fund* and *Feldman* cases.<sup>38</sup> In those cases, the value of the claimant's investment was either rendered worthless by the State's measure(s) (*Fireman's Fund*) or substantially diminished due to the loss of the company's principal business (*Feldman*). Nevertheless, in both cases the tribunals rejected the argument that an expropriation had been effected.
35. *Second*, attempts to argue that ownership of shares suffices to justify an indirect expropriation claim in circumstances similar to the present case have been rejected by tribunals for reasons that I will review below.

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<sup>35</sup> Award, ¶¶ 60-61.

<sup>36</sup> Award, ¶ 323.

<sup>37</sup> The *Fireman's Fund Insurance Company v. United Mexican States* tribunal made this point in precise terms at ¶ 205 of its Award: "First, discriminatory treatment is used to determine whether the expropriation was unlawful. In the *LIAMCO* case, quoted by FFIC, the tribunal considered that "a purely discriminatory nationalization is illegal and wrongful" under international law. However, it presupposes the presence of a nationalization (or expropriation). In the present case, the question is whether there was expropriation. It cannot be argued that because there is discrimination, there is expropriation." [Emphasis added.] *Fireman's Fund Insurance Company v. United Mexican States*, ICSID Case No. ARB(AF)/02/1, Award, 17 July 2006 ("*Fireman's Fund*").

<sup>38</sup> *Marvin Roy Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002 ("*Feldman v. Mexico*" / "*Feldman*") (CL-0097).

36. To be clear, shares in a company are a species of property protected by the Treaty. A State can directly expropriate an investor's shares or take measures short of that which cause such an impairment of the normal incidents of ownership and control as to amount to an indirect expropriation of the shares.
37. To illustrate the distinction, if a State takes the investor's shares away from it, it has expropriated them (or nationalized them if the taking is part of a larger set of measures aimed at other investors). It might also take measures against the exercise of rights relating to the shares which impair the rights of ownership and control. In addition, a State might take measures that do not interfere with the rights of ownership and control over a subsidiary, but which interfere with other legal rights held by the investor or its subsidiary. A common example is where an investor incorporates a company to hold a concession granted by the host State and the State later takes measures that destroy the concession, thereby depriving the local company of its reason for being and thereby substantially diminishing or eliminating the value of the investor's shareholding in the local company. That can support a finding of indirect expropriation.
38. Thus, the cases first look for measures relating to the ownership and control of the shares. If, as in the present case, the State takes no action directed towards the shares themselves, the analysis then turns to whether measures were taken in relation to *other* legal rights, belonging either to the investor or to the company in which it holds the shares, which rights have been impaired.
39. In *Feldman*, the claimant owned and controlled a Mexican company, CEMSA. The company's business of buying cigarettes and then exporting them and claiming VAT rebates was shut down by Mexico's finance authorities. The claimant alleged among other things that Mexico's measures had resulted in an indirect or "creeping" expropriation of his investment and were tantamount to expropriation.<sup>39</sup> The tribunal rejected the argument, holding:

152. Given that the Claimant here has lost the effective ability to export cigarettes, and any profits derived therefrom, application of the *Pope &*

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<sup>39</sup> *Feldman*, ¶ 89.

*Talbot* standard might suggest the possibility of an expropriation. However, as with *S.D. Myers*, it may be questioned as to whether the Claimant ever possessed a “right” to export that has been “taken” by the Mexican government. Also, here, as in *Pope & Talbot*, the regulatory action (enforcement of long-standing provisions of Mexican law) has not deprived the Claimant of control of the investment, CEMSA, interfered directly in the internal operations of CEMSA or displaced the Claimant as the controlling shareholder. The Claimant is free to pursue other continuing lines of export trading, such as exporting alcoholic beverages, photographic supplies, or other products for which he can obtain from Mexico the invoices required under Article 4, although he is effectively precluded from exporting cigarettes. Thus, this Tribunal believes there has been no “taking” under this standard articulated in *Pope & Talbot*, in the present case.<sup>40</sup> [Emphasis added.]

40. The same distinction was drawn in *Emmis v. Hungary*<sup>41</sup> and *Accession Mezzanine v. Hungary*<sup>42</sup>, where the tribunals held that if no measures were taken against the shares themselves, the claimants had to establish that they, or their Hungarian subsidiaries, held other rights or assets that had been taken or so interfered with such as to support a finding of expropriation of the shares.<sup>43</sup>
41. Both tribunals considered whether claims could be advanced in relation to actions taken by the respondent in respect of two Hungarian broadcasting companies. Each company had held a broadcasting licence for a specified period, which licence was extended in accordance with its terms, after which it expired. In each case, the licence was put out to tender and awarded to another company. The claimants alleged that the tendering process was not conducted lawfully or fairly and failed to accord them an “incumbent advantage” in the bidding process. The claimants in both cases argued that they or their subsidiaries held extant rights that, if honoured, would have led to the granting of licences. In order to

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<sup>40</sup> *Feldman*, ¶ 152.

<sup>41</sup> *Emmis International Holding, B.V. and others v. Republic of Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014 (Exhibit RL-0012) (“*Emmis v. Hungary*, Award” / “*Emmis*”). I was a member of this tribunal. The applicable treaties were the Netherlands-Hungary and the Switzerland-Hungary bilateral investment treaties; both had narrow arbitration clauses.

<sup>42</sup> *Accession Mezzanine Capital L.P. and Danubius Kereskedőház Vagyonkezelő Zrt. v. Republic of Hungary*, ICSID Case No. ARB/12/3, Award, 17 April 2015 (“*Accession Mezzanine*”).

<sup>43</sup> In *Emmis* the claimants continued to own shares in their Hungarian enterprise, Sláger Rádió Műsorszolgáltató Zrt. (“Sláger”), and in *Accession Mezzanine* the claimants continued to own shares in their Hungarian enterprise, Danubius Rádió Műsorszolgáltató Zrt. (“Danubius”).

determine whether an alleged interference with these claimed rights could give rise to an indirect expropriation of the claimants' shares in their Hungarian companies, the tribunals had first to determine whether the claimed rights actually existed under Hungarian law.<sup>44</sup>

42. My colleagues distinguish *Emmis* on the ground that:

212. The majority of the Tribunal considers as particularly misplaced Respondent's reference to *Emmis v. Hungary*, on which the separate and dissenting opinion also relies. Respondent has cited the case for the proposition that the claimant must have a vested property right or asset in order to justify a claim of indirect expropriation. *Emmis v. Hungary* concerned a national FM-radio frequency broadcasting license which allegedly constituted rights under Hungarian property law created by a broadcasting agreement. In *Emmis v. Hungary*, the action was to protect contract rights, not to seek compensation for shareholding interests as such. By contrast, the present arbitration implicates rights related to the taking of shares.

213. The contractual rights at stake in *Emmis v. Hungary* did not exist at the time relevant to the claim. At the time in question, all that the claimants had was an invitation to tender for a possible renewal of the license. The measures taken by the state affected rights that had already expired. Even if the value of the property was greatly diminished, the acts of the state could not cause such effect as they did not affect rights that were in force at the time the measures were taken.

213. Unlike in *Emmis v. Hungary*, in the instant arbitration, SPI owned shareholdings in SPH at the time of the PIT reforms and the alleged expropriation. The facts of *Emmis v. Hungary* are thus sufficiently distinct from the instant case that it is not applicable here.<sup>45</sup> [Emphasis added; footnote references omitted]

43. I respectfully disagree, particularly with the underlined text in the pages just quoted. As in the present case, the applicable treaties in *Emmis* and *Accession Mezzanine* each defined shares as an "asset" falling within the definition of an "investment".<sup>46</sup> Also, as in the

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<sup>44</sup> *Accession Mezzanine*, ¶¶ 53, 107, 116-129; *Emmis*, ¶¶ 222-240.

<sup>45</sup> Award, ¶¶ 213-215.

<sup>46</sup> *Emmis*, ¶ 135, citing the Bilateral Investment Treaty between the Netherlands and Hungary dated 2 September 1987 ("Netherlands-Hungary BIT"), Article 1(1) and the Bilateral Investment Treaty between Switzerland and Hungary dated 5 October 1988 ("Swiss-Hungary BIT"), Article 1(2); *Accession Mezzanine*, ¶ 24 citing the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Hungarian People's Republic for the Promotion and Reciprocal Protection of Investments dated 9 March 1987 ("UK-Hungary BIT"), Article 1(1).

present case, both cases involved Hungarian enterprises in which the claimants held shares and the claimants contended that their ownership of shares sufficed to constitute vested rights.<sup>47</sup> Taking the approach generally taken in the cases which I have already described, in both cases the mere ownership of shares in a subsidiary was *not* accepted as sufficient to ground an indirect expropriation claim.<sup>48</sup> *Accession Mezzanine* held:

In the present case, the property rights said to be the object of the Claimants' first expropriation claim are the shares in and loans to Danubius. There is no allegation in these proceedings that a measure of the State of Hungary has interfered with the Claimants' right of use in respect of these property rights.<sup>49</sup> [Emphasis added.]

44. And further:

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<sup>47</sup> In *Accession Mezzanine*, the Claimants advanced two arguments: "First, Claimants contend that Hungary indirectly expropriated the full value of the shares of Danubius and destroyed its ability to repay loans from Claimants. Second, Claimants contend that Hungary also expropriated the bundle of proprietary and contractual rights that Danubius enjoyed by virtue of the Contract Framework that Hungary created in the 1990s to encourage and protect investors in the newly-privatized broadcast industry." (*Accession Mezzanine* Award, ¶ 61). Further, the Claimants "assessed their loss in respect of the first expropriation claim as the value of Danubius as a going concern as a radio operator" (¶ 171). In *Emmis*, the Claimants similarly submitted that they "jointly hold 100 percent of the shares in Sláger, and those shares are "assets" that qualify as a covered "investment" under both the applicable BITs and the ICSID Convention", and that "indirect expropriation may affect a broad range of intangible assets with economic value, including inter alia shares in a company, and tangible and intangible rights held by an investment vehicle" (*Emmis v. Hungary*, Award, ¶ 47).

<sup>48</sup> In *Accession Mezzanine*, the tribunal found at ¶ 171 of the Award:

"Whilst the object of the expropriation is said to be the value of the shares in and the loans to Danubius, that value has been assessed by the Claimants as reflecting the value of Danubius as a going concern. But to continue as a going concern, Danubius needed a right to broadcast."

In that respect, the tribunal found at ¶¶ 187-188 that "no legislative provision or provision of any other normative act relating to the conduct of the 2009 Tender was incorporated into the Broadcasting Agreement such that Danubius would have a contractual right to enforce any such provision against the ORTT or any other party", that the Claimants' expropriation claim was "contingent upon establishing a right to a new broadcasting agreement under Hungarian law", and therefore it had no jurisdiction because "the true object of the expropriation claim is not part of the Claimants' investment in Hungary".

Similarly, in *Emmis*, the tribunal stated at ¶¶ 159-161 that: "[i]n view of the fact that the only cause of action within the Tribunal's jurisdiction is that of expropriation, Claimants must have held a property right of which they have been deprived", and that the "need to identify a proprietary interest that has been taken [was] confirmed by the definition of 'investment' in the Treaties" which referred to "every kind of asset".

Further, the tribunal found at ¶ 219 that on the facts, although "Claimants' contemporaneous accounting treatment of the Broadcasting Right confirms that it was indeed a valuable asset during the period of the licence and its first renewal", the Claimants "attributed a nil value to that asset in respect of the period after 18 November 2009". Thus, it concluded at ¶ 221 "that the 2007 Broadcasting Agreement conferred in general no rights in respect of the period after 18 November 2009 constituting valuable assets capable of expropriation".

<sup>49</sup> *Accession Mezzanine*, ¶ 179.



The Tribunal thus affirms, following an analysis of the precedents relied upon by the Claimants, that their first expropriation claim is, like their second expropriation claim, contingent upon procuring a new broadcasting agreement from the ORTT. The dispute concerning the first expropriation claim does not, therefore, arise out of the Claimants' investment in shares and loans but rather out of an alleged investment right that the Claimants never had. The Tribunal thus upholds the Respondent's objection [B2] in respect of the Claimants' first expropriation claim.<sup>50</sup> [Emphasis added.]

45. The tribunal concluded that the claimants never had any rights to the alleged object of the expropriation.<sup>51</sup> Their ownership of shares did not suffice. Hence the claimants were in the same position as the present Claimant. My colleagues contrast the present case to the situation in *Emmis* because it is said to “implicate[] rights related to the taking of shares”. But what rights related to the taking of shares have been “implicated”? As already seen, the Claimant has forthrightly and correctly conceded that it had no rights beyond its ownership of its shares and there was no measure taken in relation to SPI's shareholding in SPH. It was thus in precisely the same position as the *Emmis* and *Accession Mezzanine* claimants.
46. For example, in *Emmis*, the claimants asserted that it “is well-established as a matter of international law that indirect expropriation may affect a broad range of intangible assets with economic value, including *inter alia* shares in a company, and tangible and intangible rights held by an investment vehicle.”<sup>52</sup> But the tribunal held that there was no expropriation (direct or indirect) of the shares in the claimants' Hungarian company and therefore “the only way that the expropriation claim can be held to be within the Tribunal's jurisdiction is if Sláger [the subsidiary] had a proprietary right that survived the expiry of its broadcasting right under that Agreement.”<sup>53</sup> This could not be shown.
47. These two cases are, in my respectful opinion, directly on point. Applying their reasoning to the instant case, if the Claimant cannot identify a right to a particular taxation treatment

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<sup>50</sup> *Id.*, ¶ 185.

<sup>51</sup> *Id.*, ¶¶ 188-189.

<sup>52</sup> Claimants' submissions quoted at ¶ 47 of the *Emmis* Award.

<sup>53</sup> *Id.*, ¶ 144.

that would constitute an “asset” or a “right” under the France-Hungary Treaty, it has no claim for indirect expropriation.

48. I turn to what I see as the second weakness in the finding that Hungary indirectly expropriated SPI’s shares in SPH. This arises out of events following the Court of Justice’s condemnation of the restrictions imposed with respect to the SZÉP card and the Erzsébet voucher.

49. To set this in its proper context, it is necessary to briefly summarize the relevant facts:

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

50. It is striking that although the *Edenred* tribunal ruled in December 2016 that Edenred had suffered an expropriation, one month *before* that finding the Respondent’s expert in our proceeding, [REDACTED] filed its Second Expert Report showing that Edenred had developed a new card that it was advertising in Hungary would provide “all benefits in one place” and

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<sup>54</sup> Memorial, ¶167.

be accepted by approximately 100,000 affiliates in Hungary.<sup>55</sup> An image of the new card was adduced as Exhibit [REDACTED] in [REDACTED] Second Expert Report.<sup>56</sup>

51. There was no dispute between the Parties about Edenred's competing in Hungary by the time of our hearing in May 2017. SPI's damages expert, [REDACTED], acknowledged that he was aware of this fact.<sup>57</sup>
52. Thus, the company that the *Edenred* tribunal held had been expropriated was advertising a new card in Hungary *before* the expropriation finding was made.<sup>58</sup> As in the present case, the ownership and control of Edenred's shares in its Hungarian subsidiary had never been touched by any measure taken by Hungary. Therefore, after the CJEU held that the terms of competition must be restored, Edenred resumed competing in the Hungarian voucher market.<sup>59</sup>
53. This fact not only raises serious doubts as to whether Edenred suffered a permanent taking of its shares in its Hungarian subsidiary (since the subsidiary was able to resume

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<sup>55</sup> [REDACTED] Second Expert Report; DLA Piper, "Simplify cafeteria and incentive systems with Edenred", 2016-2017 (Exhibit [REDACTED]), p. 6.

<sup>56</sup> *Id.*, p. 6.

<sup>57</sup> Transcript, Day 3, p. 606, lines 20-22; p. 607, lines 1-12.

<sup>58</sup> *Edenred S.A. v. Hungary*, ICSID Case No. ARB/13/21 Award, ¶¶ 419-420. [Emphasis added.] I hold the members of this Tribunal in high regard. It appears to me that although the Tribunal, like me, differentiated between three categories of measures (at ¶ 316 of the award and as discussed in this opinion), it then equated dispossession with indirect expropriation. I believe that they are different concepts.

<sup>59</sup> The Respondent noted in its Post-Hearing Brief, at ¶¶ 28-29, [REDACTED]



business)<sup>60</sup>, but also points to a key issue of quantum: If, having found an expropriation, a tribunal awards damages based on lost cash flows projected into the future – as in the present case, where they are projected in perpetuity by the Claimant’s expert<sup>61</sup>– what happens when the conditions that formed the basis for the expropriation finding no longer exist and the company can resume business? <sup>62</sup> Assuming that an expropriation finding can even be made, it must follow that a claimant is overcompensated when what was assumed to be a permanent taking turns out at its highest to be a temporary one.<sup>63</sup>

## My Approach

54. The highly unusual facts of this case led me to initially view the present claim as a fair and equitable treatment / discrimination claim that was being “shoehorned” into an expropriation claim (because the Tribunal only has jurisdiction over measures of dispossession under the Treaty). Whatever had been done to SPI’s Hungarian business, it

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<sup>60</sup> The Respondent pointed this out repeatedly. See, for example, its Post-Hearing Brief at footnote 37, where it criticized the *Edenred* tribunal as follows; “It is for this reason too that the *Edenred* tribunal reached the wrong conclusion in finding that the right impacted was the “enterprise.” The tribunal erred in its conclusion that Edenred was deprived of its enterprise given, in particular, that Edenred continued to operate profitably at the time of the award, and continues to do so in Hungary today. Edenred, paras. 308, 381 and 05/02/17 Tr. 266:22 (Sedlák) acknowledging that Edenred is still in the market).”

<sup>61</sup> [REDACTED] First Expert Report, ¶ 127; Second Expert Report of [REDACTED], Appendix 10.

<sup>62</sup> [REDACTED]

<sup>63</sup> A small number of tribunals have contemplated the possibility of finding a temporary expropriation, but to the best of my knowledge, the only two that have deviated from the weight of the case law which requires the showing of a permanent taking are *Tza Yap Shum v. Peru*, ICSID Case No. ARB/07/6, Award, 7 July 2011, and *Les Laboratoires Servier S.A.S., et al v. Republic of Poland*, UNCITRAL, Final Award, 14 February 2012 (“*Les Laboratoires Servier*”) (CL-0055). (The tribunal’s discussion of the applicable provision’s reaching a temporary dispossession is followed by a redacted passage in the publicly available version of the award, so it is not possible to see what the balance of the tribunal’s thinking was on this important point.) When tribunals consider the temporary versus permanent point, they have generally found that it must be permanent. In its detailed summary of the case law on expropriation, the *Fireman’s Fund* tribunal stated at ¶ 176(d): “The taking must be permanent, and not ephemeral or temporary”; *Tecmed v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, ¶ 116; *Azurix v. Argentina*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶ 313; *LG&E v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶ 193; *Archer Daniel Midland Company and Tate & Lyle Ingredients (Americas) Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, 21 November 2007, ¶ 243; *Unglaube v. Costa Rica*, ICSID Case No. ARB/09/20, Award, 16 May 2012, ¶¶ 226-227; *Achmea v. Slovak Republic I*, PCA Case No. 2008-13, Final Award, 7 December 2012, ¶¶ 289-293; *Pezold v. Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, ¶ 516; *Busta v. Czech Republic*, SCC Case No. V 2015/014, Final Award, 10 March 2017, ¶ 389.

did not for the reasons given appear to me to be an indirect expropriation of SPI's shareholding in SPH.

55. But having reflected on the unusual wording of Article 5, I concluded that the Parties' use of the term "expropriation" rather than "dispossession" had led me (wrongly) to equate the two concepts. Labelling Article 5(2) as the Treaty's "expropriation clause" is misconceived because Article 9(2), from which the Tribunal derives its jurisdiction, speaks *not* of "disputes relating to measures of expropriation", but rather to "disputes relating to the measures of dispossession referred to in Article 5(2)". I thus concluded that I had given insufficient attention to the clause's structure and breadth.

56. Article 5(2) of the France-Hungary Treaty encompasses more than measures of expropriation and nationalization. It provides in its opening words:

The Contracting Parties shall not take expropriation or nationalization measures or any other measures the effect of which is to deprive, directly or indirectly, investors of the other Party of investments belonging to them in its territory and in its maritime zones...<sup>64</sup> [Underlining added.]

57. In its Post-Hearing Brief SPI asserted that this phrasing *extends* the reach of the clause beyond measures of expropriation or nationalization.<sup>65</sup> I agree that that is the correct reading of the clause. While many other treaties include language to clarify that measures "*equivalent to*" or "*having the same nature as*" measures of expropriation or

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<sup>64</sup> Treaty, Article 5(2). Throughout this proceeding, the Parties have employed an English translation of the Treaty which is authentic in the French and Magyar versions. Since there was no dispute between the Parties concerning the Treaty's use of three types of measures (*i.e.*, expropriation, nationalization, or any other measures the effect of which is to dispossess, directly or indirectly, investors of their investments...), I have proceeded on the basis that the English translation accurately reflects not only the French version (which is freely available) but the Magyar version as well.

<sup>65</sup> In its Post-Hearing Brief, at ¶¶ 27-28, the Claimant took issue with the Respondent's attempt to use the verb "*dispossess*" to *narrow* the scope of Article 5(2): "27. ...Respondent latches on to the BIT reference to 'dispossess' to argue that 'although largely similar to expropriation, the requirement to demonstrate dispossession imposes a higher standard.' According to Respondent, France and Hungary specifically intended to protect only against dispossession measures, which Respondent referred to as 'the kind of big ones,' which cause claimant to lose control or management over its investment." This led the Claimant to assert in response that: "28. Not only does Respondent fail to provide any support of specific intent by France and Hungary to narrow the scope of BIT protection, its argument is also irreconcilable with the plain language of the BIT. For one, as the BIT prohibits 'measures of [expropriation] or nationalization or any other measures which have the effect of dispossessing,' France and Hungary extended BIT protection against 'measures which have the effect of dispossessing' *in addition* to expropriation and nationalization. Second, the BIT is broadly worded to protect against 'any other measures which have the effect of dispossessing,' *not* 'measures which dispossess by taking over control or management,' as Hungary would like." [Italics in original; footnote references omitted.]

nationalization will also fall within the ambit of the clause, the Treaty in the instant case goes further to introduce a third category of measures that is not tied to equivalency to or having the same nature as expropriation or nationalization but rather reaches measures the effect of which is to deprive, directly or indirectly, investors of the other Party of investments belonging to them.

58. Given that different words used in a treaty are generally taken to mean different things, the use of the word “*deprive*” in Article 5(2) must be taken as intended to reach measures that are not expropriations or nationalizations (either direct or indirect). The article includes, but is not limited to, measures of expropriation and nationalization, and in my opinion reaches measures that although not “*equivalent to*” expropriation or nationalization would nevertheless have the effect of dispossessing an investor of its investment. On this approach, a dispossession could occur if it were to be of such a nature as to deprive the investor of the value or utility of its investment without actually interfering with its legal rights. Accordingly, on the facts of this case I would hold that the impugned measures dispossessed SPI of its subsidiary’s Hungarian voucher business, on which most of SPH’s business, and hence, most of SPH’s value to SPI, in turn, depended.
59. I would therefore hold that for the period of market disruption (which ended around the time of Edenred’s introduction of a new card – showing Edenred’s belief that the terms of competition were being restored) the Respondent marginalized the formerly dominant market players and effectively deprived SPI of the value of SPH’s participation in the voucher business. While neither SPI or SPH had a proprietary right to such business under Hungarian law, they had a reasonable expectation to continued participation in that business if the State continued to permit vouchers to be used to supplement employee remuneration.
60. But the absence of any legal right to such continued participation surely has to reduce the degree of certainty of that participation (in contrast to a situation in which the investor or its investment has a defined legal right that has been impaired or taken away). As noted above at paragraphs 11 to 15, the evidence shows that the uncontested changes made to the voucher taxation regime in 2010-2011 led to an approximately 11% and 5% reduction in

the volume of issued vouchers, respectively, for those two years. The voucher taxation preferences could be done away completely with in appropriate conditions. This puts the valuation of the meal voucher business in a very different position than that of other businesses which do not depend upon the continued existence of a government regime that is susceptible to change and in respect of which the State has given no commitments to the investor as to the regime's continuance.

61. In the end, three factors give rise to a right to compensation for this temporary dispossession: (i) the rapidity with which Hungary intentionally tilted the terms of competition away from the dominant market players; (ii) the virtually immediate, serious and predictable impact of the measures on SPH's existing business; and (iii) the obviously serious questions as to the measures' consistency with EU law which were, or should have been, evident to the Respondent at the time.
62. In sum, the wording of Article 5(2) is capacious enough to permit the Tribunal to find a breach, not because Hungary directly or indirectly expropriated SPI's shares in SPH, but rather because through design and effect, Hungary engineered a dispossession of the voucher business from which SPI's subsidiary derived most of its value. This was done without taking away or interfering with any of SPI's or SPH's legal rights.
63. I therefore agree with the result, but respectfully disagree with the finding of an indirect expropriation. I would allow the claim on the narrower basis described above, with due recognition that the measure was of a temporary nature and thus would adjust the damages to be awarded to reflect that fact.

### **The *Achmea* Issue**

64. A few words about the *Achmea* judgment. I agree with the majority that the *Achmea* judgment does not deprive this Tribunal of jurisdiction over the claim. While Hungary's accession to the European Union might have raised questions of incompatibility with the EU's legal system of a bilateral treaty which originally applied between an EU Member State and a third State, in my opinion it is difficult to sustain the argument that the CJEU's judgment operates to deprive an ICSID tribunal of a jurisdiction which by all relevant criteria (under the ICSID system) existed at the time that the dispute was submitted to

ICSID arbitration. I understand the argument to be that under EU law the two Contracting Parties' consents to ICSID arbitration became invalid as of the date of Hungary's accession to the EU. This raises the question of how legal developments within the EU can affect the operation of a separate and autonomous international treaty.

65. The ICSID Convention is of course a multilateral treaty to which both Hungary and France are Contracting States. Article 9(2) of the BIT designated ICSID as the forum for investor-State disputes if both Contracting Parties acceded to the Convention.<sup>66</sup> France ratified the Convention on 21 August 1967 and Hungary on 4 February 1987; it entered into force for the former on 20 September 1967 and for the latter on 6 May 1987.<sup>67</sup> Accordingly, both Contracting Parties gave their treaty-based consents to ICSID arbitration well before Hungary joined the European Union.
66. With their prior offers in writing never withdrawn or modified by the two Contracting Parties when Hungary became a Member State, insofar as the ICSID system was concerned, it remained only for a French or Hungarian investor to match the other State's prior consent by giving its own consent in writing in the terms specified by the BIT for an agreement to arbitrate to be formed under Article 25 of the Convention.<sup>68</sup> At that point, insofar as the ICSID Convention was concerned, a valid and enforceable arbitration agreement would come into effect. So far as I can see, nothing in the Convention recognizes that a judgment of a court having jurisdiction within an ICSID Contracting State that has already given its consent to ICSID arbitration can undo such an arbitration agreement, even if that court plays a supranational role within a regional legal system.

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<sup>66</sup> Article 9(2), third paragraph, states in this regard: "When each of the Contracting Parties becomes a party to the Convention on the Settlement of Disputes Concerning Investments Between States and Nationals of Other States, done at Washington on March 18th, 1965, such a dispute shall, if it cannot be settled amicably within six months from the time it was raised by one of the parties to the dispute, be submitted to the International Centre for the Settlement of Investment Disputes for settlement by arbitration."

<sup>67</sup> <https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx>

<sup>68</sup> Article 25(1) states in this regard: "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre..." It is well established that under the Convention, it is not necessary that the parties' consents be given at the same time.



67. Had France and Hungary agreed that their respective investors' rights to claim under the BIT would cease to exist once Hungary became an EU Member State – a limitation on their prior treaty-based consents that could easily comport with the ICSID Convention – the situation would be different. They would have provided in advance for the withdrawal of their respective consents upon the occurrence of a specified event (the accession of Hungary to the EU). But this was not done.
68. On well-established principle, the Convention contemplates that jurisdiction is to be established at the time that a claim is submitted to arbitration. If both parties have given their consent in writing, the agreement is formed and the final sentence of Article 25(1) makes clear that: “When the parties have given their consent, no party may withdraw its consent unilaterally.”<sup>69</sup> Therefore, I do not think that a consent given by an EU Member State to an investor of another Member State which was valid in ICSID terms at the time of the submission of the dispute to arbitration can be varied or nullified by a subsequent development in EU law which declares intra-EU BITs' arbitration clauses to be inconsistent with the EU regime, even if that judgment operates *ex tunc* within that regime.
69. On a separate point, I note that the stated policy concern in *Achmea* was that an arbitral tribunal with no power to refer questions of EU law to the CJEU might err in its application of EU law. That concern does not arise on the facts of the present case. The Tribunal has in fact given full effect to the Court of Justice's ruling in *Commissioner v. Hungary*, by relying upon the Court's findings on the various restrictions pertaining to the SZÉP card and Erzsébet voucher frameworks. In this way, the Award is congruent with what the Court found in respect of the very measures at issue in this case and no inconsistency with *substantive* EU law appears to exist.
70. I recognize that there is an additional concern that the existence of intra-EU investor-State arbitration poses issues in relation to the “duty of loyalty” that EU law imposes on each Member State. The remedy granted by this Tribunal is not the remedy that the Court

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<sup>69</sup> I realize that it can be argued that strictly speaking the Respondent is not seeking to “withdraw its consent unilaterally” because it can be said to be acting pursuant to a binding determination made by the CJEU which has binding effect within all EU Member States. But in terms of the present arbitration, the CJEU's decision as articulated by and through the agency of the Respondent would, if accepted, have the same effect.

granted and the idea that different remedies can be granted by different adjudicative bodies considering the same measures might give rise to concern. But that is for the EU and its Member States to sort out. It is not for an ICSID tribunal to resolve within a particular case where jurisdiction was established at the time that the claim was submitted to arbitration.

71. In the end, I do not think that the CJEU's judgment can vary the obligations of two EU Member States that are also ICSID Contracting States. The Convention is a separate treaty which established an autonomous arbitral regime that operates purely at the level of international law, disconnected from the national legal systems of its Contracting States.<sup>70</sup> It is to be construed and applied on its own terms.

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<sup>70</sup> Except insofar as the courts of each Contracting States are obliged to enforce ICSID awards as if they are a final judgment of the courts of that State, See Article 54(1).



J. Christopher Thomas, QC

Date: 19 January 2019