

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.

In the arbitration proceeding between

VIGOTOP LIMITED

Claimant

and

HUNGARY

Respondent

ICSID Case No. ARB/11/22

AWARD

Members of the Tribunal

Professor Dr. Klaus Sachs, President of the Tribunal
Mr. Doak Bishop, Arbitrator
Dr. Veijo Heiskanen, Arbitrator

Secretary of the Tribunal
Mr. Benjamin Garel

Date of dispatch to the Parties:
1 October 2014

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Frequently Used Abbreviations and Acronyms

| | |
|---------------------------|---|
| ACC | American Chance Casinos |
| Albertirsa Land | Land plots 0188/2 and 0188/3 in Albertirsa purchased by Mr. Yoav Blum in 2007 |
| Assignment Agreement | Assignment agreement entered into by KC Bidding and SDI Europe on 20 December 2010 |
| Blum I | Witness Statement of Mr. Yoav Blum dated 30 August 2012 |
| Blum II | Second Witness Statement of Mr. Yoav Blum dated 17 May 2013 |
| Concession Contract | Concession Contract dated 9 October 2009 between Hungary, represented by the Minister of Finance, and KC Bidding |
| Counter-Memorial | Respondent's Counter-Memorial dated 1 February 2013 |
| Császy I | Witness Statement of Dr. Zsolt Császy dated 22 August 2012 |
| Cyprus-Hungary BIT/Treaty | Agreement between the Government of the Hungarian People's Republic and the Government of the Republic of Cyprus on Mutual Promotion and Protection of Investment dated 24 May 1989 |
| Fellegi I | Witness Statement of Dr. Tamás Fellegi dated 29 January 2013 |
| Fellegi II | Second Witness Statement of Dr. Tamás Fellegi dated 8 September 2013 |
| Gaye I | Witness Statement of Mr. Gal Gaye dated 30 August 2012 |
| Gyurcsány | Witness Statement of Mr. Ferenc Gyurcsány dated 28 August 2012 |
| Handover Protocol | Handing over minutes signed on 12 February 2009 by Dr. Bálint Varga, on behalf of Mr. Yoav Blum |
| Hearing | Hearing on jurisdiction and the merits held between 11 November 2013 and 22 November 2013 in Washington, D.C. |
| ICSID | International Centre for Settlement of Investment Disputes |
| ICSID Arbitration Rules | ICSID Rules of Procedure for Arbitration Pro- |

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| | ceedings |
| ICSID Convention | Convention on the Settlement of Investment Disputes between States and Nationals of other States dated March 18, 1965 |
| ICSID Institution Rules | ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings |
| Joint Chronology | Comprehensive chronology jointly submitted by the Parties on 18 October 2013 |
| KC Management | King City Management Kft. |
| Király I | Expert Opinion of Professor Dr. Miklós Király dated 30 January 2013 |
| Király II | Second Expert Opinion of Professor Dr. Miklós Király dated 6 September 2013 |
| Kisfaludi | Expert Opinion of Professor András Kisfaludi dated 17 May 2013 |
| Land Swap Agreement | Land swap agreement between the MNV, acting as representative of the Hungarian State, and Mr. Yoav Blum |
| Land Swap Litigation | Court case initiated by MNV against Mr. Yoav Blum before the Fejér County on 18 November 2009 |
| Langhammer I | Witness Statement of Mr. Fred H. Langhammer dated 23 August 2012 |
| Langhammer II | Second Witness Statement of Mr. Fred H. Langhammer dated 14 May 2013 |
| Lauder I | Witness Statement of Mr. Ronald S. Lauder dated 21 August 2012 (signed on 23 August 2012) |
| Lease Agreement | Lease agreement entered into by Mr. Yoav Blum and KC Bidding on 8 May 2009 |
| Leased Real Properties | Four of the 16 Sukoró properties that were not affected by the tract formation procedure |
| Memorial | Claimant's Memorial dated 3 September 2012 |
| Miller Buckfire | Miller Buckfire & Co., LLC |
| MNV | Hungarian State Holding Company |
| MSZP | Magyar Szocialista Párt |
| Nagy | Witness Statement of Dr. Róza Nagy dated 9 September 2013 |

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| NIF | Hungarian National Infrastructure Department |
| NVT | National Asset Management Council |
| Oszkó I | Witness Statement of Dr. Péter Oszkó dated 30 January 2013 filed with Respondent's Counter-Memorial |
| Oszkó II | Second Witness Statement of Dr. Péter Oszkó dated 6 September 2013 |
| Penalty Proceedings | Court proceedings commenced on 23 February 2011 by Respondent against KC Bidding and Mr. Ronald Lauder before the Metropolitan Court of Budapest |
| Pilis Land | Land plot 0188/2 in Pilis which Mr. Yoav Blum had entered into a preliminary agreement to purchase in 2008 |
| PO | Procedural Order |
| Project | King's City Project |
| Project Companies | KC Bidding, SDI Europe and KC Management |
| Project Sponsors | Shareholders of Florista Holdings Ltd, RSL Capital LLC, Ride Holdings LLC and Pereg Holdings LLC |
| Registration Authorization | Declaration issued by the MNV on 12 December 2008 assenting to the registration of Mr. Yoav Blum as the purchaser of the 20 Sukoró properties under the Land Swap Agreement |
| Rejoinder | Respondent's Rejoinder dated 9 September 2013 |
| Reply | Claimant's Reply dated 21 May 2013 |
| RfA | Claimant's Request for Arbitration dated 18 July 2011 |
| Schrijver | Legal Opinion of Professor Dr. Nico J. Schrijver dated 10 May 2013 |
| Secretary | Secretary of the Tribunal |
| SDI Europe/Concession Company | The Concession Company, SDI Europe Kft., established as a Hungarian company (wholly owned by KC Bidding) in accordance with Article 7.1 of the Concession Contract, with its principal place of business in Székesfehérvár |
| Special Project Status | Special project status under Act LIII of 2006 on the acceleration and simplification of the implementation of investment projects of par- |

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| | ticular importance for the national economy |
| Sukoró Site | Land plots in Sukoró in the Central Transdanubian region which Mr. Yoav Blum identified in spring 2008 as a potential site for the Project |
| Suretyship | Declaration of Mr. Ronald Lauder on the assumption of joint and several suretyship submitted on 19 November 2009 by Dr. Bárd, to the Ministry of Finance |
| Tátrai I | Witness Statement of Mr. Miklós Tátrai dated 1 August 2012 |
| Tausz I | Expert Opinion of Dr. Patrick Tausz dated 31 August 2012 |
| Tausz II | Second Expert Opinion of Dr. Patrick Tausz dated 18 May 2013 |
| Tender | Call for tenders published by the Ministry of Finance on 10 February 2009 for the conclusion of a concession contract regarding the establishment and operation of a Class I casino in the Central-Transdanubian Region |
| Termination Letter | Letter of 10 January 2011 from Minister Matolcsy to Mr. Benkley notifying termination of the Concession Contract |
| Termination Proceedings | Parallel proceedings commenced by KC Bidding against Respondent on 30 March 2011 in the Central Court of Pest District |
| Treviso | TREVISO Mérnöki Iroda Kft |
| TWC | Trans World Corporation |
| Varga I | Expert Opinion of Professor István Varga dated 30 January 2013 |
| Varga II | Second Expert Opinion of Professor István Varga dated 6 September 2013 |

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ICSID Case No.ARB/11/22

I. THE PARTIES

A. Claimant

1. **VIGOTOP LIMITED** is a limited liability company incorporated under the laws of the Republic of Cyprus, having its registered office at Elenion Megaro, 83 Spyrou Kyprianou Avenue, Office 301, Larnaca, Cyprus, CY-6051, hereinafter referred to as “**Claimant**” or “**Vigotop**”.

B. Respondent

2. **HUNGARY** is a sovereign state, hereinafter referred to as “**Respondent**” or “**Hungary**”, represented in this arbitration personally by Dr. Victor Orbán, Prime Minister, The Prime Minister’s Office, 1055 Budapest, Kossuth Lajos tér 2-4, Hungary; Dr. György Matolcsy, Minister for National Economy, Ministry of National Economy, 1055 Budapest, Honvéd utca 13-15, Hungary; Dr. János Martonyi, Minister for Foreign Affairs, Ministry for Foreign Affairs, 1027 Budapest, Bem rakpart 47, Hungary; and Dr. Tamás Fellegi, Minister for National Development, Ministry for National Development, 1054 Budapest, Akadémia utca 3, Hungary.
3. Claimant and Respondent are hereinafter referred to separately as a “**Party**” and collectively as the “**Parties**”.

II. THE ARBITRAL TRIBUNAL

4. The Arbitral Tribunal has been constituted as follows:

- (i) Mr. Doak Bishop
(appointed by Claimant)
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III. SUMMARY OF THE PROCEDURAL HISTORY

A. Arbitration Agreement and Institution of the Proceedings

5. This arbitration concerns a legal dispute between Vigotop and Hungary arising out of Vigotop's investment in KC Bidding Kft. ("**KC Bidding**")¹ and King City Management Kft. ("**KC Management**"),² through which Vigotop held rights in the King's City Project (the "**Project**"), including the Concession Contract between Hungary, rep-

¹ KC Bidding is a company established under the laws of Hungary on 3 December 2008, and registered on 4 December 2008, formed as the company through which Claimant could participate in a tender by Hungary for a concession for the establishment and operation of a mega-casino. The call for tender required that a minimum 25% of the shares in the concession receiver be held, directly or indirectly, by a partner with experience in organizing games of chance in Hungary or abroad. This requirement was fulfilled by the participation of 21st Century Resorts a.s. trading as American Chance Casinos ("**ACC**"). ACC holds 25% of the shares in KC Bidding; Claimant holds 75%. ACC is a subsidiary of Trans World Corporation ("**TWC**"), a NASDAQ-listed company. Memorial, ¶¶ 17 and 56.

² Claimant holds 100% of the shares in KC Management, which was incorporated in Hungary on 5 November 2007 and registered on 12 November 2007. On 26 January 2010, Claimant acquired KC Management as a company for the construction of the King's City Project. Memorial, ¶ 19. Vigotop acquired the shares of KC Management from another Cypriot company, Sabase Holdings Limited, whose ultimate shareholders are the same as those of Vigotop. KC Management was created to manage the local affairs of the King's City Project, specifically, to control the construction phase of the Project. Gaye I, ¶ 14.

resented by the Minister of Finance, and KC Bidding, dated 9 October 2009 (the “**Concession Contract**”). Claimant alleges that Respondent violated the *Agreement between the Government of the Hungarian People’s Republic and the Government of the Republic of Cyprus on Mutual Promotion and Protection of Investment* (the “**Cyprus-Hungary BIT**” or the “**Treaty**”), which entered into force on 24 May 1989, by taking a series of unlawful measures, culminating in the termination of the Concession Contract, which allegedly amounted to an expropriation of Claimant’s investment without compensation, in violation of Article 4 of the Treaty.

6. Article 4 of the Cyprus-Hungary BIT provides:

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

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

(b) the measures are not discriminatory;

(c) the measures are accompanied by provision for the payment of just compensation.

2. The amount of compensation must correspond to the market value of the expropriated investments at the moment of the expropriation.

3. The amount of this compensation may be estimated according to the laws and regulations of the country where the expropriation is made.

4. The compensation must be paid without undue delay upon completion of the legal expropriation procedure, but not later than three months upon completion of this procedure and shall be transferred in the currency in which the investment is made. In the event of delay beyond the three-months’ period, the Contracting Party concerned shall be liable to the payment of interest based on prevailing rates.

5. Investors of either Contracting Party who suffer losses of their investments in the territory of the other Contracting State due to war or other armed conflict or state of emergency in the territory of the other Contracting Party, shall be treated, with respect to the compensation for these losses, as investors of any third State.”

7. Claimant has invoked the arbitration provisions in Article 7 of the Cyprus-Hungary BIT providing for arbitration before the International Centre for Settlement of Investment Disputes (“**ICSID**”). Article 7 of the Treaty provides as follows:

“1. Any dispute between either Contracting Party and the investor of the other Contracting Party concerning expropriation of an investment shall, as far as possible, be settled by the disputing parties in an amicable way.

2. If such disputes cannot be settled within six months from the date either party requested amicable settlement, it shall, upon request of the investor, be submitted to one of the following:

(a) The Arbitration Institute of the Arbitral Tribunal of the Chamber of Commerce in Stockholm;

(b) the Arbitral Tribunal of the International Chamber of Commerce in Paris;

(c) the International Centre for the Settlement of Investment Disputes in case both Contracting Parties have become members of the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and other Nationals of Other States.”

8. On 18 July 2011, Claimant filed its Request for Arbitration (“**RfA**”), together with Exhibits, with the Secretary-General of ICSID in accordance with Article 36 of the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the “**ICSID Convention**”) and the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the “**ICSID Institution Rules**”).
9. On 19 July 2011, the Secretariat of ICSID (the “**Secretariat**”) transmitted the RfA to Respondent.
10. On 4 August 2011, the Secretary-General of ICSID (the “**Secretary-General**”) registered the RfA in accordance with Article 36 of the ICSID Convention and Rules 6 and 7 of the ICSID Institution Rules and notified the Parties of such registration. The case was assigned the ICSID Case Number ARB/11/22.
11. On 11 October 2011, Claimant informed the Secretariat that Respondent had agreed to the number and method of appointment of arbitrators proposed in the RfA, namely that the Arbitral Tribunal shall be composed of three arbitrators, one arbitrator to be appointed by each Party and the third arbitrator, the President of the Arbitral Tribunal, to be appointed by agreement of the Parties. On the same day, Claimant appointed Mr. Doak Bishop, a national of the United States of America, as arbitrator.
12. On 17 October 2011, Mr. Doak Bishop accepted his appointment as arbitrator, having provided a duly signed declaration to the Secretariat in accordance with Rule 6(2) of

the ICSID Rules of Procedure for Arbitration Proceedings (the “**ICSID Arbitration Rules**”).

13. On 27 October 2011, Respondent appointed Dr. Veijo Heiskanen, a national of Finland, as arbitrator.
14. On 1 November 2011, Dr. Veijo Heiskanen accepted his appointment as arbitrator, having provided a duly signed declaration to the Secretariat in accordance with Rule 6(2) of the ICSID Arbitration Rules.
15. On 16 December 2011, Claimant addressed the Chairman of the ICSID Administrative Council, through the Secretary-General, with a request to appoint an arbitrator to be the President of the Arbitral Tribunal in accordance with Article 38 of the ICSID Convention and Rule 4(1) of the ICSID Arbitration Rules, noting that more than 90 days had elapsed since registration of the RfA and the Tribunal had not yet been constituted.
16. On 6 January 2012, the Acting Secretary-General proposed to the Parties three candidates for President of the Tribunal, requesting that the Parties indicate their agreement to one or more of the candidates by way of secret ballot.
17. On 18 January 2012, the Secretariat informed the Parties that they had agreed on the appointment of Prof. Dr. Klaus Sachs as President of the Tribunal.
18. On 19 January 2012, Prof. Dr. Klaus Sachs accepted his appointment as President of the Tribunal, having provided a duly signed declaration to the Secretariat in accordance with Rule 6(2) of the ICSID Arbitration Rules.
19. On 19 January 2012, the Secretary-General informed the Parties that Prof. Dr. Klaus Sachs, Mr. Doak Bishop and Dr. Veijo Heiskanen had accepted their appointments as arbitrators and, accordingly, pursuant to Rule 6(1) of the ICSID Arbitration Rules, the Tribunal was deemed to have been constituted and the proceedings to have begun as of such date; in addition, Mr. Paul-Jean Le Cannu was designated to serve as the Secretary (the “**Secretary**”) of the Tribunal.

B. The Arbitral Proceedings

1. The Pre-Hearing Phase

20. On 12 April 2012, the Arbitral Tribunal held its First Session with the Parties in Paris, having received on 6 April 2012 a joint document containing the Parties’ agreement on a number of agenda items and their respective positions on which they were unable to

reach agreement. Present at the First Session were the full Tribunal, the Secretary, the legal counsel of Claimant and Respondent and one representative of Respondent.

21. At the First Session, the Tribunal considered a number of procedural matters in accordance with the Agenda that was circulated and agreed prior to the First Session.
22. The following schedule of submissions on jurisdiction and the merits (including quantum) was agreed at the First Session:
 - (i) Claimant shall file its Memorial by 3 September 2012;
 - (ii) Respondent shall file its Counter-Memorial by 1 February 2013;
 - (iii) Claimant shall file its Reply by 21 May 2013; and
 - (iv) Respondent shall file its Rejoinder by 9 September 2013.
23. On 5 May 2012, the Final Minutes of the First Session were circulated to the Parties by the Secretary.
24. On 3 September 2012, in accordance with the agreed schedule of submissions, Claimant submitted (electronically and concomitantly in hard copies sent by courier) the following documents to ICSID:
 - (i) Claimant's Memorial dated 3 September 2012 ("**Memorial**");
 - (ii) Claimant's Factual Exhibits C-1 through C-253;
 - (iii) The Expert Report of Compass Lexecon LLC;
 - (iv) The Compass Lexecon Exhibits C-1 through C-125;
 - (v) The Expert Opinion of Dr. Patrick Tausz;
 - (vi) The Annexes to Dr. Tausz's Expert Opinion 1 through 11;
 - (vii) The Expert Report of Global Gaming & Hospitality LLC;
 - (viii) The Witness Statements of Messrs. Gal Gaye, Ronald Lauder, Yoav Blum, Fred Langhammer, Itzhak Fisher, Ferenc Gyurcsány, Gábor Molnár, Miklós Tátrai, and Zsolt Császy (WS-1 through WS-9); and
 - (ix) Claimant's Legal Authorities CLA-1 through CLA-86.³

³ Claimant's legal authorities are hereinafter referred to as "**Exhibit CLA**".

25. On 14 December 2012, Respondent filed a request that Claimant produce certain documents (“**Respondent’s First Document Request**”) and a Redfern Schedule setting out Respondent’s requests, Claimant’s accompanying responses and objections, Respondent’s comments on Claimant’s responses, and Claimant’s responses to Respondent’s comments.
26. On 21 December 2012, the Tribunal issued Procedural Order No. 1 (“**PO 1**”) together with a completed Redfern Schedule, setting out the Tribunal’s decisions on Respondent’s First Document Request.
27. By E-mail of 7 January 2013, Claimant produced those items that it had been ordered to produce pursuant to the Redfern Schedule. Claimant stated that in relation to item 6 of the Redfern Schedule, it had not produced certain E-mails between Dr. Bálint Varga and Mr. Gal Gaye (the “**Varga E-mails**”) on the grounds of legal professional privilege.
28. By E-mail of 10 January 2013, Respondent responded to Claimant’s E-mail of 7 January 2013, requesting that Claimant articulate the basis for its privilege claim in respect of the Varga E-mails.
29. By E-mail of 17 January 2013, Claimant responded to Respondent’s E-mail of 10 January 2013, elaborating upon its privilege claim in respect of the Varga E-mails.
30. By E-mail of 21 January 2013, Respondent requested that the Tribunal order Claimant to produce the Varga E-mails.
31. By E-mail of 1 February 2013, in accordance with the agreed schedule of submissions, Respondent submitted the following documents to ICSID:
 - (i) Respondent’s Counter-Memorial dated 1 February 2013 (“**Counter-Memorial**”);
 - (ii) The Witness Statements of Dr. Peter Oszkó, Dr. Tamás Fellegi and Ms. Kamilla Szandrocha; and
 - (iii) The Expert Reports of Prof. István Varga, Prof. Miklós Király and Messrs. Jim McDaid, Stephen Nicholas Pattie and Brent C. Kaczmarek.
32. Concomitantly, Respondent uploaded its full submission, including Exhibits R-1 to R-138, all Exhibits to the witness statements and expert reports, and Legal Authorities

RLA-1 to RLA-59⁴ on the FTP server of the case and sent hard copies by courier to ICSID.

33. On 18 February 2013, the Tribunal issued Procedural Order No. 2 (“**PO 2**”), in which Respondent’s request for production of the Varga E-mails was denied.
34. On 22 April 2013, Claimant filed a request that Respondent produce certain documents (“**Claimant’s Document Request**”) and a Redfern Schedule setting out Claimant’s requests, Respondent’s accompanying responses and objections, and Claimant’s comments on Respondent’s responses and objections.
35. By E-mail of 23 April 2013, Respondent responded to Claimant’s Document Request, stating that a decision by the Tribunal was not required as certain documents could not be located.
36. By E-mail of 23 April 2013, Claimant responded to Respondent’s E-mail of the same date, reiterating its request that the Tribunal render a decision requiring document production for each of the outstanding items in its Redfern Schedule.
37. On 25 April 2013, the Tribunal issued Procedural Order No. 3 (“**PO 3**”), together with a completed Redfern Schedule setting out the Tribunal’s decisions on Claimant’s Document Request.
38. By E-mail of 10 May 2013, in accordance with PO 3, Respondent confirmed to the Tribunal that no further responsive documents had been located.
39. By E-mail of 21 May 2013, in accordance with the agreed schedule of submissions, Claimant submitted the following documents to ICSID:
 - (i) Claimant’s Reply dated 21 May 2013 (“**Reply**”);
 - (ii) The Witness Statements of Dr. Károly Bárd and Mr. Barry Meyer;
 - (iii) The Second Witness Statements of Messrs. Gal Gaye, Yoav Blum, Fred Langhammer, Itzhak Fisher, Zsolt Császzy and Miklós Tátrai;
 - (iv) The GGH Rebuttal Report related to the King’s City Development dated 20 May 2013, with appendix;
 - (v) The Expert Report of Spectrum Gaming Group dated 20 May 2013, with appendices 1-5;

⁴ Respondent’s legal authorities are hereinafter referred to as “**Exhibit RLA**”.

- (vi) The Supplemental Report on Damage Valuation on Vigotop's Investment in the King's City Project by Compass Lexecon LLC dated 21 May 2013, with appendices A-B;
 - (vii) The Legal Opinion of Dr. Nico J. Schrijver dated 17 May 2013, with annexes 1-2;
 - (viii) The Expert Opinion of Professor András Kisfaludi; and
 - (ix) The Second Expert Opinion of Dr. Patrick Tausz.
40. Concomitantly, Claimant uploaded its full submission, including Exhibits C-254 to C-407, all Exhibits to the witness statements and expert reports, and Exhibits CLA-87 to CLA-127 on the FTP server of the case and sent hard copies by courier to ICSID.
41. By E-mail of 30 June 2013, Respondent requested leave from the Tribunal to submit further requests for the production of documents set out in an attached Redfern Schedule ("**Respondent's Second Document Request**").
42. On 19 July 2013, the Tribunal issued Procedural Order No. 4 ("**PO 4**"), together with a completed Redfern Schedule setting out the Tribunal's decision on Respondent's Second Document Request.
43. By letter of 29 August 2013, the Tribunal requested that the Parties jointly submit a comprehensive chronology and chart of the key issues, together with the supporting evidence attached, when possible, by way of hyperlink, by 4 October 2013. The Tribunal stated that if the Parties were unable to agree on joint documents, they could each submit their own versions.
44. By letter of 9 September 2013, Respondent submitted the following documents to ICSID (which were concomitantly or shortly thereafter uploaded onto the FTP server of the case and received in hard copies by ICSID):
- (i) Respondent's Rejoinder dated 9 September 2013 ("**Rejoinder**");
 - (ii) The Index of Factual Exhibits and Exhibits R-139 to R-177;
 - (iii) The Index of Legal Authorities and Exhibits RLA-60 to RLA-77;
 - (iv) The Second Witness Statements of Dr. Péter Oszkó and Dr. Tamás Fellegi;
 - (v) The Witness Statement of Dr. Róza Nagy;
 - (vi) The Second Expert Reports of Prof. István Varga and Prof. Dr. Miklós Király;
 - (vii) The Second Expert Reports of Messrs. Jim McDaid, Brent C. Kaczmarek and Stephen Nicholas Pattie; and

- (viii) The Expert Report of Mr. Stephen J. Karoul.
45. On 10 October 2013, the Secretary-General informed the Tribunal that, due to an internal redistribution of the workload at the Centre, Mr. Benjamin Garel had been assigned to serve as Secretary of the Tribunal; however, Mr. Le Cannu would also remain available to provide assistance to the Tribunal until the commencement of the hearing on jurisdiction and the merits (the “**Hearing**”).
 46. By E-mail of 11 October 2013, in accordance with paragraph 16.11 of the Minutes of the First Session, the Parties indicated which witnesses and experts would be called to appear at the Hearing.
 47. On 18 October 2013, Claimant filed a request to introduce new documentary evidence into the record. On the same day, the Parties jointly submitted their comprehensive chronology (the “**Joint Chronology**”) and a *dramatis personae*.
 48. On 21 October 2013, a pre-hearing organizational meeting was held between the Parties and the Tribunal by conference call at 6:00 p.m. CET.
 49. On 22 October 2013, Respondent filed its observations on Claimant’s request to introduce new documents into the record.
 50. On 23 October 2013, Claimant filed a response to Respondent’s observations of 22 October 2013.
 51. On 24 October 2013, Respondent filed further observations on Claimant’s response of 23 October 2013.
 52. On 25 October 2013, the Tribunal issued Procedural Order No. 5 (“**PO 5**”) addressing Claimant’s request to introduce a number of new documents into the record in accordance with the Minutes of the pre-hearing telephone conference of 21 October 2013. In its PO 5, the Tribunal admitted Claimant’s proposed Exhibits C-408, C-409, C-410, C-411, C-413, C-416, C-423 and C-424 into the record. The admission of Claimant’s proposed Exhibits C-412, C-422 and C-426 was conditioned upon a showing at the latest by Tuesday, 29 October 2013, that these documents were not available on the date of the filing of the Reply. The Tribunal denied the admission of all other proposed new exhibits.
 53. On 28 October 2013, Claimant filed a request to introduce additional new documents into the record.
 54. On 30 October 2013, Respondent agreed to Claimant’s request of 28 October 2013.

55. On 5 November 2013, the Tribunal acknowledged the agreement of the Parties regarding the admission of a signed copy of Exhibit C-249 and proposed Exhibit C-427. The Tribunal formally confirmed on 8 November 2013 that these exhibits were part of the record.
56. On 7 November 2013, Claimant withdrew its requests for leave to introduce proposed Exhibits C-412, C-422 and C-426 into the record. On the same day, Claimant filed a request for leave to introduce new Exhibit CLA-128 into the record.
57. On 8 November 2013, Respondent agreed to the introduction of proposed Exhibit CLA-128 into the record and filed a request for leave to introduce proposed Exhibit R-178 into the record. On the same day, Claimant agreed, and the Tribunal formally admitted proposed Exhibit R-178 into the record. The Tribunal formally confirmed on the first day of the Hearing that Exhibit CLA-128 was part of the record.⁵
58. On 9 November 2013, Claimant filed a request to introduce proposed Exhibits C-428, C-429 and C-430 into the record. Respondent confirmed on the first day of the Hearing that it had no objections to it, and the exhibits were introduced into the record.⁶
59. On 10 November 2013, Claimant submitted a request for provisional measures in accordance with Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules, together with a request to introduce a number of new exhibits submitted in support of the request for provisional measures. On the same day, the Tribunal informed the Parties that it had decided to admit these new exhibits (C-431 to C-440) into the record as they were submitted in support of the request for provisional measures. Later that day, Claimant submitted another proposed new Exhibit C-441 to be introduced into the record in support of its request for provisional measures. Respondent confirmed on the first day of the Hearing that it had no objections, and Exhibit C-441 was admitted into the record.⁷ In its request for provisional measures, Claimant requested that the Tribunal, *inter alia*, order Respondent to refrain from any further conduct that might in any way interfere with the Hungarian witnesses and experts or which might in any way inhibit Claimant from presenting its case, and to refrain immediately from leaking information about these proceedings to the Hungarian media and aiding or abetting media coverage that identifies or targets, directly or indirectly, witnesses and others who are involved in these proceedings.

⁵ Transcript, p. 28, lines 1-3.

⁶ Transcript, p. 28, lines 5-22 and p. 29, lines 1-3.

⁷ Transcript, p. 29, lines 14-22 and p. 30, lines 1-7.

60. On 12 November 2013 (day 2 of the Hearing), the Tribunal informed the Parties that the Tribunal had concluded that it did not wish to issue a formal ruling on Claimant's request for interim measures at this stage, pointing out that it did not wish to and could not prevent the Parties from talking to the press, but that this obviously could not, and should not, be done in such a manner that would aggravate the dispute or undermine the integrity of the proceedings.⁸

2. The Hearing on Jurisdiction and the Merits

61. The Hearing was held between 11 November 2013 and 22 November 2013 at the World Bank, 1818 H Street, N.W., Conference Room 4-800, in Washington, D.C. The Hearing was audio recorded and transcribed by a court reporter, Ms. Laurie Carlisle of B&B Reporters.

62. At the Hearing, Claimant was represented by Mr. Gal Gaye and Respondent was represented by Mr. Tibor Gyori, State Secretary, Prime Minister's Office, Mr. Zoltán Cséfalvay, State Secretary, Ministry of National Economy and Mr. Péter Jármai, Deputy State Secretary, Ministry of National Economy.

63. The following appeared as legal counsel for Claimant at the Hearing: Mr. Stephen Fietta, Mr. Robert Volterra, Mr. Patricio Grané Labat, Dr. James Upcher, Ms. Laura Rees-Evans, Mr. Ashique Rahman, Mr. Chris Holland and Ms. Zsofia Young of Volterra Fietta, London; Dr. Péter Köves of Lakatos Köves and Partners Ügyvédi Iroda, Budapest; and Dr. Ágnes Sánta of Sánta and Pozsgai Law Firm, Budapest.

64. The following appeared as legal counsel for Respondent at the Hearing: Dr. István Réczicza, Dr. Milán Kohlrusz and Dr. Márk Baja of Réczicza White & Case LLP, Budapest; Mr. Charles Nairac, Mr. John S. Willems, Ms. Nathalie Makowski, Mr. Florian Quintard, Ms. Noor Davies and Mr. Sven Volkmer of White & Case LLP, Paris; Mr. Damien Nyer of White & Case LLP, New York; and Dr. Beatrix Bártfai of Sárhegyi és Társai Law Firm, Budapest.

65. Each of the Parties made an oral presentation at the opening of the Hearing.

66. During the Hearing, the following fact and expert witnesses gave evidence for Claimant and were cross-examined by Respondent's counsel in accordance with the procedure agreed by the Parties in the Minutes of the First Session and the pre-hearing tele-

⁸ Transcript, p. 367, lines 4-11.

phone conference: Mr. Gal Gaye, Mr. Yoav Blum, Mr. Fred Langhammer, Mr. Itzhak Fisher, Mr. Barry Meyer of Global Investments and Consultants, Dr. Zsolt Császzy, Mr. Miklós Tátrai, Dr. Manuel Abdala of Compass Lexecon, Mr. Ronald Lauder, Mr. György Spányi of Spányi & Jakab Kft., Mr. Michael Kim of Global Gaming and Hospitality and Messrs. Michael Pollock, Robert Heller and Stephen Brammell of Spectrum Gaming Group.

67. During the Hearing, the following fact and expert witnesses gave evidence for Respondent and were cross-examined by Claimant's counsel in accordance with the procedure agreed by the Parties in the Minutes of the First Session and the pre-hearing telephone conference: Dr. Péter Oszkó, Dr. Tamás Fellegi, Dr. Róza Nagy, Ms. Kamilla Szandrocha, Mr. Jim McDaid of Gardiner and Theobald, Mr. Stephen Karoul of Euro-Asia Consulting, Mr. Stephen Pattie of Whitebridge Hospitality and Mr. Brent Kaczmarek of Navigant Consulting.
68. On 14 November 2014, Claimant submitted two documents to be introduced as new Exhibits C-442 and C-443 into the record, in response to a request from the Tribunal to provide the source of information submitted by Claimant in its opening statement.⁹ The documents were subsequently admitted into the record.
69. On 20 November 2014, Claimant provided the Tribunal with proposed Exhibit C-444, in response to a request from the Tribunal on the eighth day of the Hearing.¹⁰ The document was subsequently admitted into the record.

3. The Post-Hearing Phase

70. On 6 December 2013, the Tribunal circulated to the Parties a final list of questions, replacing the list of questions circulated to the Parties on 20 November 2013 at the Hearing. The Tribunal invited the Parties to address these questions in their Post-Hearing Briefs.
71. On 12 December 2013, Respondent submitted, in response to a request from the Tribunal on the first day of the Hearing and as announced on the ninth day, a new document to be introduced into the record, Exhibit R-179.¹¹

⁹ Transcript, p. 182, lines 5-15, p. 373, lines 19-22 and p. 374, lines 1-11.

¹⁰ Transcript, p. 2381, lines 18-22.

¹¹ Transcript, p. 99, lines 1-14, p. 2678, lines 19-22, p. 2679, lines 1-4 and p. 2714, lines 1-6.

72. On 17 January 2014, Claimant sought leave from the Tribunal to introduce new documents into the record (proposed Exhibits C-445, C-446 and C-447), to which Respondent had no objection.
73. On 21 January 2014, Respondent sought leave from the Tribunal to introduce a new document into the record (proposed Exhibit R-180), to which Claimant objected on 22 January 2014.
74. On 22 January 2014, Claimant sought leave from the Tribunal to introduce new documents into the record (proposed Exhibits C-448 and C-449), to which Respondent had no objection.
75. On 28 January 2014, the Tribunal admitted Exhibits C-445 through C-449 and Exhibit R-180 into the record.
76. On 13 February 2014, each of the Parties submitted a Post-Hearing Brief.
77. On 21 March 2014, each of the Parties submitted its respective statement of costs.
78. On 30 March 2014, Claimant informed the Tribunal that the Parties had agreed that they would not submit comments on the respective submissions on costs, and on 31 March 2014, Respondent confirmed this agreement.
79. On 7 August 2014, the Tribunal declared the proceedings closed pursuant to Rule 38(1) of the ICSID Arbitration Rules.

IV. FACTUAL BACKGROUND

80. This section sets out a summary of the facts that are not disputed between the Parties or are otherwise established by the evidence submitted in these proceedings to the satisfaction of the Tribunal:

A. Claimant

81. Claimant is a company incorporated under the laws of the Republic of Cyprus and was established on 25 October 2008.¹²
82. Claimant's shareholders are:

¹² Memorial, ¶ 16; **Exhibit C-2**.

| | |
|---------------------------|-----------------------|
| Florista Holdings Limited | 50%; |
| RSL Capital LLC | 16.67%; |
| Ride Holdings LLC | 16.67%; and |
| Pereg Holdings LLC | 16.67%. ¹³ |

83. The individual shareholders of Florista Holdings Ltd, RSL Capital LLC, Ride Holdings LLC and Pereg Holdings LLC respectively are Messrs. Yoav Blum, Ronald S. Lauder and Fred H. Langhammer, and Mr. and Mrs. Itzhak Fisher. Messrs. Blum, Lauder, Langhammer and Fisher are hereinafter referred to collectively as the “**Project Sponsors**”.¹⁴

B. Political Circumstances

84. At the time Claimant decided to locate the Project in Hungary, the governing political party in Hungary was the Magyar Szocialista Párt (MSZP), led by Prime Minister Ferenc Gyurcsány,¹⁵ who had been re-elected in April 2006.¹⁶
85. On 21 March 2009, Mr. Gyurcsány announced his intention to resign as Prime Minister.¹⁷
86. On 14 April 2009, an interim administration was formed to govern until the next national elections, which were to be held in April 2010. This government was led by Mr. Gordon Bajnai, former Minister of Local Government and Regional Development and former Minister of National Development.¹⁸
87. In the April 2010 Hungarian elections, the Fidesz Party came to power with a two-thirds majority in the Hungarian Parliament. On 29 May 2010, Dr. Viktor Orbán, the leader of the Fidesz Party, was elected by the Parliament as Prime Minister.¹⁹

¹³ Memorial, ¶ 21; **Exhibit C-7**.

¹⁴ Memorial, ¶ 22.

¹⁵ Memorial, ¶ 39.

¹⁶ Mr. Gyurcsány had been elected Prime Minister in a parliamentary vote in 2004. Joint Chronology, item 3.

¹⁷ Memorial, ¶ 45; Joint Chronology, item 100.

¹⁸ Memorial, ¶ 46; Joint Chronology, item 107.

¹⁹ Memorial, ¶ 47; Joint Chronology, items 214 and 218.

C. From the Inception of the Project to the Conclusion of the Concession Contract

1. Inception of the Project

88. The Project was intended by Claimant to be “*one of Europe’s premier tourist destinations*”: a resort consisting of a mega-casino, three luxury hotels and various attractions including amusement theme parks, spa facilities, a skating rink, botanical gardens, a museum, an aquarium, a concert hall, conference facilities and a golf course.²⁰
89. Having identified Hungary as a potential location for the Project, Mr. Blum and Mr. Lauder met on 31 August 2007 with Mr. Bajnai, Respondent’s then Minister for Local Government and Regional Development, and Dr. Ábel Garamhegyi, State Secretary for the Ministry of National Development and Economy, in Budapest in order to introduce them to the Project. Following the meeting, Minister Bajnai expressed his support for the Project and offered his Ministry’s assistance in establishing the Project in Hungary.²¹
90. In a subsequent meeting on 17 September 2007, Minister Bajnai met with Messrs. Blum, Langhammer and Fisher, as well as Mr. Gal Gaye, then CFO to the Project,²² and Dr. Károly Bárd, Mr. Blum’s legal advisor and later head of KC Bidding’s legal team.²³ Minister Bajnai offered support for the Project by (i) appointing Mr. Roland Mányai as a liaison between the authorities involved and the Project Sponsors; and stating that (ii) he considered the Project to be eligible for special project status; (iii) the Government would invest in infrastructure in the vicinity of the Project; and (iv) the Government would be willing to discuss a grant of exclusivity for the gaming concession.²⁴

2. Potential Site Locations: From Albertirsa and Pilis to Sukoró

91. The Project Sponsors initially planned to locate the Project in the Central Hungary region²⁵ where Mr. Blum had purchased land plots 0188/2 and 0188/3 in Albertirsa (the “**Albertirsa Land**”) in 2007²⁶ and had entered into a preliminary agreement to

²⁰ Memorial, ¶ 49; **Exhibit C-23**.

²¹ Memorial, ¶¶ 80-81; **Exhibits C-50** and **C-47**; Joint Chronology, item 12.

²² Memorial, ¶ 29.

²³ Memorial, ¶¶ 101, 180.

²⁴ **Exhibit C-51**; Joint Chronology, item 16.

²⁵ Memorial, ¶ 95.

²⁶ Joint Chronology, items 10 and 11.

purchase land plot 0188/2 in Pilis (the “**Pilis Land**”) in 2008.²⁷ Following consultation with their advisors and financiers, however, the Project Sponsors ultimately decided not to realize the Project in the Central Hungary region.²⁸

92. In spring 2008, Mr. Blum identified several plots of land in Sukoró in the Central Transdanubian region (the “**Sukoró Site**”) as a potential site for the Project.²⁹ The Sukoró Site was owned by Respondent and administered by the Hungarian State Holding Company (the “**MNV**”).³⁰ It was located on the shores of Lake Velence, approximately 55 kilometers from Budapest International Airport.³¹

3. Land Swap Transaction

93. On 6 May 2008, Dr. Bárd wrote to Mr. Miklós Tátrai, the CEO of the MNV, regarding the utilization of the Sukoró Site, in terms of exploring options for acquiring the land by way of purchase, asset management agreement, lease, exchange, etc.³² During the negotiations, it was agreed that Mr. Blum would acquire the Sukoró Site by way of a land swap agreement with Respondent.³³ Under the terms of such land swap agreement, Mr. Blum would exchange the Albertirsa Land and the Pilis Land for the Sukoró Site, consisting of 19 properties under the ownership of the State and a 20th property to be formed, and pay any difference in value between the properties at Sukoró and his own properties to the MNV.³⁴ Under Hungarian law, the alienation of State-owned arable land can only be performed through a public tender, unless it is the State that wishes to acquire the land “*for the purposes of public utility infrastructure projects or for some other reason of public interest,*” in which case a land swap is possible.³⁵
94. On 9 June 2008, the MNV contacted the Hungarian National Infrastructure Department (the “**NIF**”) to ask whether the tract of the main road number 4 would pass through the properties at Albertirsa outskirts plots number 0188/2 and 0188/3 and Pilis outskirts plot number 0188/2.³⁶ On 16 June 2008, the NIF confirmed to the MNV that “*the Monor-Pilis by-pass section of main road 4 touches the real estates of Albertirsa*

²⁷ **Exhibit R-127**; Joint Chronology, item 26.

²⁸ Memorial, ¶ 96; Joint Chronology, item 20.

²⁹ Memorial, ¶ 52; Joint Chronology, item 25.

³⁰ Memorial, ¶ 101.

³¹ Memorial, ¶ 99.

³² Memorial, ¶ 102; **Exhibit C-57**; Joint Chronology, item 32.

³³ Memorial, ¶¶ 103-107; **Exhibits C-58** and **C-59**.

³⁴ Memorial, ¶ 108; **Exhibit C-41**; Joint Chronology, item 59.

³⁵ Counter-Memorial, ¶ 59; *cf.* Memorial, ¶ 109.

³⁶ **Exhibit R-23**; Joint Chronology, item 40.

0188/2 and Pilis 0188/2”); it did not mention Albertirsa plot 0188/3.³⁷ On 29 July 2008, the NIF informed the MNV that the road project would affect all three of Mr. Blum’s plots.³⁸

95. In January 2008, the MNV had instructed Perfekting Kft. (“**Perfekting**”) to value the Albertirsa Land, the Pilis Land and the Sukoró Site.³⁹ Perfekting was a specialized valuation company which had won a public tender process to prepare valuations for the MNV.
96. On 3 July 2008, Perfekting issued its final valuations of the properties involved in the land swap, as follows:
- (i) The Sukoró Site – HUF 1,085,259,750;⁴⁰
 - (ii) The Albertirsa Land – HUF 382,600,000;⁴¹ and
 - (iii) The Pilis Land – HUF 404,800,000.⁴²
97. Based on the valuation carried out by Perfekting, the MNV determined that the land swap could proceed on the basis that Mr. Blum pay the difference in value between the two sets of properties in the amount of HUF 296,610,000 (approximately EUR 1.2 million).⁴³
98. On 30 July 2008, the National Asset Management Council (the “**NVT**”), which is the executive council and supreme decision-making organ of the MNV, responsible for State-owned assets voted unanimously in favor of the land swap agreement, with four of its seven members present.⁴⁴
99. On 30 July 2008, following the NVT’s vote, Mr. Blum and Mr. Tátrai, acting in his capacity as CEO of the MNV, signed the land swap agreement between the MNV, act-

³⁷ **Exhibit C-61**; Joint Chronology, item 43.

³⁸ **Exhibit R-40**; Joint Chronology, item 56.

³⁹ Memorial, ¶ 114; **Exhibit C-64**.

⁴⁰ **Exhibit R-34**; Joint Chronology, item 50. In its Revised Valuation Report – Sukoró, Perfekting also valued two properties, *i.e.*, plots number 032/4 and 032/5, which were ultimately not included in the land swap. The total value of the 20 Sukoró properties to be swapped pursuant to the Land Swap Agreement, which provided the basis for the calculation of the difference in value between the two sets of properties, amounted to HUF 1,084,010,100. **Exhibit C-41**, Section I.1.

⁴¹ **Exhibit R-33**; Joint Chronology, item 51.

⁴² **Exhibit R-35**; Joint Chronology, item 52.

⁴³ Memorial, ¶ 115; **Exhibit C-41**, Section I.4.

⁴⁴ Memorial, ¶ 118; **Exhibit C-65**; Joint Chronology, item 58.

- ing as representative of the Hungarian State, and Mr. Blum (the “**Land Swap Agreement**”).⁴⁵
100. On 12 December 2008, the MNV, acting on behalf of the Hungarian State, issued a declaration assenting to the registration of Mr. Blum as the purchaser of the 20 Sukoró properties under the Land Swap Agreement (the “**Registration Authorization**”).⁴⁶
101. Mr. Blum was ultimately not registered by the Székesfehérvár Land Registry Office as the owner of the 20 Sukoró properties because a mandatory “*tract formation*” process failed to be properly completed.⁴⁷ Tract formation was necessary for four plots of the Sukoró Site as Respondent was required by Hungarian law to retain ownership of a 10-meter-wide lakeshore strip of land within the Sukoró Site.⁴⁸ The procedure was required to be initiated by the MNV, and the State organs were responsible for properly registering the title.⁴⁹
102. With regard to the 16 properties that were not directly affected by the tract formation procedure, on 12 February 2009, the MNV, acting on behalf of the State, and Dr. Bálint Varga, a Hungarian attorney acting on behalf of Mr. Blum, signed handing over minutes transferring physical possession of these properties to Mr. Blum (the “**Handover Protocol**”).⁵⁰
103. On 26 February 2009, the MNV and Mr. Blum submitted a joint declaration requesting that the Land Registry Office register Mr. Blum’s ownership of the 16 plots unaffected by the tract formation procedure.⁵¹ Both the Land Registry Office as first instance and, later, the Fejér County Court as second instance rejected the joint declaration on the grounds that partial fulfillment, *i.e.*, registration of Mr. Blum’s ownership of only 16 instead of all 20 plots, could only have been possible if the swap contract had been amended by the parties to stipulate that partial fulfillment was possible.⁵²

⁴⁵ Memorial, ¶ 118; **Exhibit C-41**; Joint Chronology, item 59.

⁴⁶ **Exhibit C-83**.

⁴⁷ Memorial, ¶¶ 138-152.

⁴⁸ Memorial, ¶ 135; **Exhibit C-73**.

⁴⁹ Memorial, ¶ 136.

⁵⁰ Memorial, ¶ 146; **Exhibit C-84**; Joint Chronology, item 97.

⁵¹ Memorial, ¶ 146.

⁵² Memorial, ¶ 147; Tausz I, ¶ 3.5.4. The swap contract provided that 20 properties under the ownership of the State (19 existing and a 20th to be created) would be swapped for three properties under the ownership of Mr. Blum. However, the swap contract did not specify for which of the State properties each of the three properties of Mr. Blum would be swapped.

104. On 8 May 2009, Mr. Blum and KC Bidding entered into a lease agreement, granting KC Bidding a 24-year lease over four of the 16 Sukoró properties that were not affected by the tract formation procedure (the “**Leased Real Properties**”), with an option to extend the term for an additional 10 years (the “**Lease Agreement**”).⁵³
105. On 13 May 2009, the MNV issued a declaration confirming that Mr. Blum had paid the value difference between the exchanged properties and had fulfilled his other obligations arising out of the Land Swap Agreement, and that the properties not affected by the tract formation procedure had been transferred to the possession of Mr. Blum.⁵⁴

4. Incentives and Special Project Status

a) Financial Incentives

106. On 9 October 2008, Mr. György Rétfalvi, CEO of ITD Hungary Zrt., the Hungarian Investment and Trade Development Agency (“**ITD Hungary**”), informed Mr. Blum, as Chairman of KC Management, that the Government understood that the company was planning to establish a tourist attraction in Sukoró with a value of EUR 951.4 million, thereby creating 2,326 new jobs between 2008-2012. On that basis, as Mr. Rétfalvi explained, Hungary was willing to offer KC Management financial incentives in order to support the realization of this investment in Hungary. The Government’s subsidy proposal consisted of a non-refundable direct incentive for the creation of a tourist attraction project, in the value of HUF 2,000 million (which was increased to HUF 2,600 million in December 2008);⁵⁵ a non-refundable direct incentive for employee training up to a value of EUR 1 million; and a corporate tax allowance.⁵⁶ This offer constituted a “*conditional commitment*” of the Hungarian Government and was valid for three months.⁵⁷ The offer provided that an incentive agreement defining the terms and conditions of the support should be concluded between the Ministry for National Development and Economy and KC Management, in which certain basic obligations would be defined according to the predicted figures for realization of the investment, financial guarantees and the number of jobs created and maintained.⁵⁸

⁵³ Memorial, ¶ 152; **Exhibit C-10**; Joint Chronology, item 111.

⁵⁴ **Exhibit C-87**.

⁵⁵ Counter-Memorial, ¶ 125; **Exhibit C-40**; Joint Chronology, item 85.

⁵⁶ Counter-Memorial, ¶ 122; **Exhibit C-40**; Joint Chronology, item 68.

⁵⁷ **Exhibit C-40**.

⁵⁸ **Exhibit C-40**.

107. KC Management asked for additional time to consider the proposal. The validity of the offer was initially extended until 30 June 2009 and then to 31 August 2009.⁵⁹
108. On 6 April 2009, Dr. Anita Buzás of ITD Hungary informed Mr. Gaye, then CFO and Acting CEO of Claimant, of the procedure to be followed prior to execution of the incentive agreement, including the requirement of Governmental approval.⁶⁰
109. On 5 August 2009, Messrs. Gaye and Blum and Mr. Blum's Hungarian lawyer, Dr. Varga, met with Dr. Buzás and Mr. Gábor Pusztai of ITD Hungary to discuss the terms of the incentive agreement. At that meeting, Mr. Blum, on behalf of KC Management, and Dr. Buzás and Mr. Pusztai, on behalf of ITD Hungary, signed a protocol setting out the key terms of the incentive agreement, including the topographical numbers for the real estate in Sukoró affected by the investment. The protocol specified that "*any support can be provided only if the real estates are free, clear and unencumbered.*"⁶¹

b) Special Project Status

110. On 30 October 2008, in response to a suggestion made by Ms. Kamilla Szandrocha, Director for Incentives & After Care at ITD Hungary, Mr. Gaye applied to ITD Hungary for special project status for the "*King's City Project to be located in Lake Velence,*" attaching the King's City site plans with plot numbers.⁶²
111. On 10 April 2009, the Project was awarded special project status under *Act LIII of 2006 on the acceleration and simplification of the implementation of investment projects of particular importance for the national economy* ("**Special Project Status**").⁶³ This act aimed to attract foreign investment in Hungary by reducing the administrative formalities for the implementation of such investments.⁶⁴ The Government Decree, by which Special Project Status was awarded to the Project, related to the procedures required for the implementation of the Project "*in the outskirts of the community of Sukoró*" and listed the relevant topographical lot numbers.⁶⁵ The Government Decree annexed the list of official permits required for the implementation of the Project, and

⁵⁹ Memorial, ¶ 266; Counter-Memorial, ¶ 125; Exhibits R-54 and C-67.

⁶⁰ Exhibit C-246; Joint Chronology, item 105.

⁶¹ Memorial, ¶ 267; Exhibit C-186; Joint Chronology, item 138.

⁶² Memorial, ¶ 131; Exhibit C-72; Counter-Memorial, ¶ 285; Exhibit R-46; Joint Chronology, item 72.

⁶³ Exhibit C-42.

⁶⁴ Memorial, ¶¶ 126-127; Exhibit C-69; Joint Chronology, item 4.

⁶⁵ Memorial, ¶ 132; Exhibit C-42; Counter-Memorial, ¶ 136; Joint Chronology, item 106.

designated certain authorities as competent authorities, and others as specialist authorities, empowering them to carry out the various administrative procedures.⁶⁶

5. Land Swap Investigations

112. On 5 June 2009, following Mr. Gyurcsány's resignation in March 2009 and in response to questions being raised in Parliament and in the media about the Sukoró transaction, Prime Minister Bajnai requested that the Minister of Finance, Dr. Péter Oszkó, conduct an investigation into whether (i) "*the [...] swap transaction was legitimate*"; (ii) "*the value determined by [Perfekting] of the real properties was proportional*"; and (iii) "*the state party and its agents were acting legitimately when determining the values.*"⁶⁷ In addition, in mid-2009, the State Prosecutor's Office initiated a criminal investigation into the land swap transaction, and the State Audit Office, an independent body which audits the management of public funds and State property,⁶⁸ audited the land swap procedure.⁶⁹

a) The NVT Investigation

113. On 8 June 2009, Dr. Tamás Katona, State Secretary at the Ministry of Finance, contacted Dr. János Nagy, President of the NVT, instructing him to lead the investigation requested by Prime Minister Bajnai.⁷⁰ On 17 June 2009, Dr. János Nagy reported his findings to the Ministry of Finance.⁷¹ He first described the applicable statutory framework and explained the circumstances in which the Land Swap Agreement had been approved by the relevant authorities.⁷² He then noted that, consistent with the applicable legislation, Perfekting had been appointed by the MNV to perform the valuation of the properties in Sukoró, Pilis and Albertirsa, and that there "*ha[d] been no doubt on our behalf with regard to the well-groundedness of the value appraisals*" with regard to the Land Swap Agreement.⁷³ Finally, he explained that other State bodies, including the NIF and the Central Transdanubia Environmental and Water Directorate, had also been consulted and did not object to the transaction.⁷⁴

⁶⁶ **Exhibit C-42.**

⁶⁷ Memorial, ¶ 161; **Exhibit C-102**; Joint Chronology, item 116.

⁶⁸ Counter-Memorial, ¶ 166.

⁶⁹ See ¶¶ 121 and 123 below.

⁷⁰ Memorial, ¶ 163; **Exhibit C-103**; Joint Chronology, item 117.

⁷¹ Counter-Memorial, ¶ 152; **Exhibit C-64.**

⁷² Counter-Memorial, ¶ 152; **Exhibit C-64.**

⁷³ **Exhibit C-64**; Joint Chronology, item 120.

⁷⁴ Counter-Memorial, ¶ 152; **Exhibit C-64.**

114. On 1 July 2009, in response to questions from Dr. Oszkó, Dr. János Nagy submitted a detailed report to Dr. Oszkó, confirming that the Land Swap Agreement was legal.⁷⁵ Dr. János Nagy opined that the transaction qualified as a mixed contract (*i.e.*, a combination of a swap and a sale), which was valid under Hungarian law only if supported by a public-interest objective. He confirmed that this public interest requirement was met in light of the contemplated road development project on the Albertirsa Land and the Pilis Land.⁷⁶

b) Internal Investigation of the Ministry of Finance

115. As it was the NVT that had initially approved the Sukoró transaction before the Land Swap Agreement was concluded and might therefore have had a vested interest in the outcome of any investigation regarding the Agreement's validity, the Asset Management Department within the Ministry of Finance also undertook directly to review the land swap transaction. The internal investigation of the Ministry of Finance was supervised by Dr. Éva Kovácsné Egedi, head of the Asset Management Department.⁷⁷

116. On 17 July 2009, Dr. Egedi submitted an internal memorandum to Dr. Oszkó in which she confirmed that the "*legitimate nature of the legal transaction cannot be questioned in a substantiated manner*" but noted that neither her department nor the MNV was able to justify with certainty that the entire territory of the Pilis Land and Albertirsa Land was required for the construction of the road project.⁷⁸ She concluded that the legitimacy of the swap could not "*be warranted beyond any doubt*" and that there was a risk that, if it were established that the contract did not satisfy, or violated, the relevant legislative provisions, this might result in the transaction being deemed "*null and void.*"⁷⁹

117. Dr. Egedi noted that the Ministry of Finance did not consider itself to be competent to comment upon the Perfekting valuation.⁸⁰

118. On 16 July 2009, Dr. Oszkó communicated the findings of his internal investigations to Prime Minister Bajnai,⁸¹ stating that "*it is not possible to question the legal nature*

⁷⁵ Memorial, ¶ 166; **Exhibit C-105**; Joint Chronology, item 122.

⁷⁶ Counter-Memorial, ¶ 154; **Exhibit C-105**.

⁷⁷ Counter-Memorial, ¶ 155; **Exhibit C-107**; Joint Chronology, item 127.

⁷⁸ Counter-Memorial, ¶ 155; **Exhibit C-107**; Joint Chronology, item 127.

⁷⁹ **Exhibit C-107**.

⁸⁰ Counter-Memorial, ¶ 158; **Exhibit C-107**.

⁸¹ Memorial, ¶ 167; **Exhibit C-106**. This letter is mistakenly dated 16 July 2009; it was in fact sent after Dr. Oszkó received Dr. Egedi's memorandum.

of the transaction in a well-grounded manner.”⁸² He expressed the opinion that the procedure carried out by the MNV was in accordance with the provisions of the relevant legislation in force but that he could not decide the question whether the public-interest objective was fulfilled in respect of the whole transaction, “namely the whole land area acquired by the state and whether such a requirement can be derived at all from the legislative provisions.”⁸³

c) Investigation of the Prosecutor’s Office

119. The Chief Prosecutor’s Office initiated⁸⁴ criminal investigations into the MNV’s valuation of Mr. Blum’s properties at Albertirsa and Pilis and, on 17 June 2009, appointed TREVISO Mérnöki Iroda Kft (“**Treviso**”), a valuation company, to determine the market value of these properties.⁸⁵

d) Internal Investigation of the MNV

120. In September 2009, Ms. Tímea Krisánszky, a judicial expert appointed by the MNV, issued a report on her review of the valuation of the Albertirsa Land, the Pilis Land and the Sukoró Site prepared by Perfekting. She concluded that the evaluation had been conducted in a methodologically correct manner, such that the “*course and steps of the calculation and the calculations themselves are controllable and correct*” and that “*in the whole the evaluation is good.*”⁸⁶

e) 2008 Report of the Hungarian State Audit Office

121. On 14 July 2009, the State Audit Office sent a draft report to the MNV which was highly critical of the way in which the MNV had conducted the land swap procedure.⁸⁷

⁸² Memorial, ¶¶ 168-169; **Exhibit C-106**; Joint Chronology, item 126.

⁸³ **Exhibit C-106**.

⁸⁴ According to Respondent, the criminal investigations were initiated *ex officio*, following the “*heavy criticisms against the Land Swap Agreement, originally by the LMP green party.*” Rejoinder, ¶ 89; Counter-Memorial, ¶ 160. Claimant maintains, however, that the investigations were requested by Dr. Gyula Budai, then Association Director of MAGOSZ (National Association of Hungarian Farmers’ Societies and Cooperatives), and others. Memorial, ¶ 171; Reply, ¶¶ 147-148.

⁸⁵ Counter-Memorial, ¶ 161; **Exhibit C-119**; Joint Chronology, item 119.

⁸⁶ Memorial, ¶ 182; **Exhibit C-115**; Counter-Memorial, ¶ 163; Joint Chronology, item 160. In testimony given at a court hearing held on 21 October 2011 before the Budapest Metropolitan Court, Ms. Krisánszky stated that she focused on the material and formal examination of the evaluation and did not review the accuracy of the pricing. **Exhibit R-124**.

⁸⁷ **Exhibit C-110**; Joint Chronology, item 124.

122. In its annual report for 2008, which was issued in August 2009 and was publicly available,⁸⁸ the State Audit Office expressed the view that the Land Swap Agreement was “*null and void*,”⁸⁹ under Section 200(2) of the Hungarian Civil Code, on the grounds that “*the aim of public interest, stipulated in section (4) of §13 of the NFA act, did not exist for the total area of the exchange real estates.*”⁹⁰ The construction of the M4 motorway had been stated to be the public-interest objective, but the report noted that only 5.63% of the properties swapped in Pilis and Albertirsa would have been required for the construction. In addition, there was a significant difference between the land value given by the Regional chief clerk of Pest County and the value taken into account in the exchange, which could affect the setoff values of the real estate in Sukoró.⁹¹

6. Tender for the Casino Concession

123. On 10 February 2009, the Ministry of Finance published a call for tenders for the conclusion of a concession contract regarding the establishment and operation of a Class I casino in the Central-Transdanubian Region (the “**Tender**”). The Tender included the Sukoró Site.⁹²
124. On 13 May 2009, KC Bidding submitted its tender application for the construction and operation of a Class I casino in the Central-Transdanubian Region to the Ministry of Finance, providing for the Project location to be the Sukoró Site.⁹³
125. After reviewing KC Bidding’s tender application, the Application Assessment Committee of the Ministry of Finance concluded in its decision proposal of 27 July 2009 that KC Bidding’s application was valid in both content and form. The Committee recommended the announcement of KC Bidding as the winner of the Tender but noted that the ownership status of the Sukoró Site was “*still not fully settled*” and that investigations were underway.⁹⁴
126. On 4 August 2009, Mr. Csaba Árvai, Head of the Main Department of Sectoral Development and Financing within the Ministry of Finance, sent a memorandum to Dr. Oszkó in which he discussed the Application Assessment Committee’s report and the advantages and disadvantages associated with accepting or rejecting KC Bidding’s ap-

⁸⁸ Counter-Memorial, ¶ 166.

⁸⁹ **Exhibit C-110**; Joint Chronology, item 136.

⁹⁰ **Exhibit C-110**.

⁹¹ **Exhibit C-110**.

⁹² Memorial, ¶ 153; **Exhibit C-25**; Joint Chronology, item 93.

⁹³ Memorial, ¶ 153; **Exhibit C-29**; Joint Chronology, item 113.

⁹⁴ Memorial, ¶ 154; **Exhibit C-89**; Joint Chronology, item 131.

plication. He noted that the “*the risk* [whether the potential concessionaire will possess the real estate indicated as the location of the casino investment via ownership or right of lease in the future as well as], *the uncertainty related to the real estates can be handled at the level of the concession contract.*”⁹⁵

127. On 14 August 2009, the Ministry of Finance announced KC Bidding as the winner of the Tender.⁹⁶

7. Parallel Discussions regarding the Land Swap Agreement

128. On 4 September 2009, immediately following the issuance of the State Audit Office report at the end of August 2009,⁹⁷ Dr. Oszkó wrote to Mr. Blum as follows:

“As it is known to you, the swap transaction related to the Sukoró properties has given rise to significant negative reactions on behalf of the general public in the recent weeks. Moreover, several specific legal concerns have occurred with regard to the property swap which has also been objected to recently by the Hungarian State Audit Office in the recent past. With regard to the above, I consider a review of the recent events necessary because, it is my well-grounded opinion that an investment project which is granted special treatment from the aspect of national economy can only be implemented if it is done without any objections pertaining to prevailing law and the public opinion.

I am of the opinion that in the present situation, we need to find a solution for the legal concerns and those raised by the general public in relation to the property swap transaction. With regard to the latter and considering the fact that even the State Audit Office considered the property swap transaction to be legally null and void in its report, it is raised as a possibility that clarification of legal doubts and concerns can be ensured by the restoration of the previous ownerships of the properties involved in the swap transaction. Naturally, apart from and beyond these facts, I would still like to know the investor’s position and solution proposals considering the legal and societal concerns occurring in wide circles, as well as the report of the State Audit Office and the prosecutorial procedures in progress before the competent state attorney offices with regard to the investment project.

⁹⁵ **Exhibit C-112**; Joint Chronology, item 137.

⁹⁶ Memorial, ¶¶ 61, 154; **Exhibit C-90**; Joint Chronology, item 141.

⁹⁷ **Exhibit C-110**; Joint Chronology, item 141.

I recommend that the problems be discussed at a personal meeting and for this purpose, I hereby request that you kindly contact my secretariat at the following phone number [...].”⁹⁸

129. Upon receipt of this letter, Mr. Blum sought legal advice from his lawyer Dr. Varga regarding the Land Swap Agreement. On 8 September 2009, Dr. Varga opined that the valuation made by Perfekting met the requirement that the price of the properties had to be set by an independent expert.⁹⁹ He stated that, based on the Hungarian Civil Code, value disproportionality was not a basis for annulling a contract; it only rendered a contract avoidable.¹⁰⁰ Dr. Varga confirmed that the issue was unsettled as to whether the public interest condition, which is required to avoid a public tender, is met when it only relates to a portion of the swapped territory. Dr. Varga considered that this issue could only be settled by assessing the available data and documents, or bringing it before a court.¹⁰¹
130. The meeting requested by Dr. Oszkó in his letter of 4 September 2009 took place on 10 September 2009 between Mr. Blum, his lawyer Dr. Bárd and Dr. Oszkó. The Parties disagree as to what topics were discussed at this meeting. The Tribunal will address this meeting in more detail later.
131. On 21 September 2009, Treviso, the valuation company appointed by the Chief Prosecutor’s Office, issued its opinion stating that Perfekting’s valuation appraisal for the Albertirsa Land and the Pilis Land was incorrect.¹⁰² The opinion stated that the total market value of both the Albertirsa Land and the Pilis Land was HUF 193,876,823, rather than HUF 787,400,000 as determined by Perfekting.¹⁰³
132. On 1 October 2009, the Ministry of Finance and the MNV received the Treviso opinion¹⁰⁴ and thereby, in the MNV’s view, became aware of “*a major new circumstance*

⁹⁸ **Exhibit C-117.**

⁹⁹ **Exhibit C-277**, article IV.

¹⁰⁰ **Exhibit C-277**, article IV.

¹⁰¹ In its Rejoinder, Respondent pointed out that this relevant portion of Dr. Varga’s opinion was omitted in the English translation submitted by Claimant as **Exhibit C-277**. Rejoinder, note 146.

¹⁰² Memorial, ¶ 188; **Exhibit R-70**; Joint Chronology, item 162. According to the memorandum prepared by Dr. Egedi on 5 October 2009, Mr. Blum purchased the parcels of real estate in 2008 for a total of HUF 225,453,000; Perfekting set the market value at HUF 787,400,000; the tax and value certifications issued by the local governments in June and July 2009 included a value of HUF 136,918,560; and Treviso determined the value to be HUF 193,876,823. **Exhibit R-73.**

¹⁰³ **Exhibit R-70.**

¹⁰⁴ **Exhibit R-71**, Joint Chronology, item 164.

that may render the swap null and void.”¹⁰⁵ The MNV forwarded this appraisal to Dr. Varga.¹⁰⁶

133. In preparation for Dr. Oszkó’s “*meeting to be held regarding the Sukoró real estate property case,*” Dr. Egedi of the Ministry of Finance reviewed the State Audit Office report and the Treviso opinion and concluded in her memorandum to Dr. Oszkó of 5 October 2009 that there were three options for what could be done: (i) “*the parties can mutually cancel the agreement [...] supposing that the conditions of a criminal offence are met*” or, if such conditions have not been met, then, by raising the issue of the state having lost assets (the land swap agreement not being in line with the actual value of the real estate property); (ii) “*MNV can cancel the contract*”; or (iii) “*MNV can contest the validity of the agreement.*”¹⁰⁷
134. On 5 October 2009, Dr. Oszkó and other MNV officials met with Messrs. Langhammer and Blum and Dr. Bárd. The Parties also disagree on the content and the outcome of this meeting. A main point of disagreement is whether Dr. Oszkó recommended to the Project Sponsors that the Land Swap Agreement be terminated on a consensual basis and whether he said that failing an agreement the question of the validity of the Land Swap Agreement would be referred to the courts.

8. Preparation and Conclusion of the Concession Contract

135. On 8 September 2009, Dr. Bárd attended an initial meeting with Mr. Árvai at the Ministry of Finance to discuss the draft Concession Contract. With respect to the contractual deadline to certify legitimate possession and the right to build on the Sukoró Site, Dr. Bárd proposed “*the date of submission of the application for the license of the state tax authority, or 1 January 2014 at the latest,*” instead of the 1 January 2011 deadline proposed by the Ministry of Finance.¹⁰⁸
136. After the meeting, on 11 September 2009, Mr. Árvai sent Dr. Oszkó the first draft of the Concession Contract and informed him that:

“[t]he stringent regulations, guarantees, that you required due to the unsettled legal status with respect of the properties – which are covered in sections 9.3, 12.5.1, 12.5.4, 14.3, 15.2.1.1, and 1 17.10 – can be summarized as follows:

¹⁰⁵ **Exhibit C-131.**

¹⁰⁶ **Exhibit C-131.**

¹⁰⁷ **Exhibit R-73;** Joint Chronology, item 169.

¹⁰⁸ **Exhibit R-67;** Joint Chronology, item 153.

1. *The concession company shall be obliged to continuously be in lawful possession of the properties and their appropriate parts suitable for the establishment of the casino and the right to build the necessary superstructures within the town of Sukoró no later than as of 1 January 2011 until the expiry of the concession period.*

2. *The concessionaire shall be obliged to verify no later than by 1 January 2011 that it is in lawful possession of the relevant properties and the right to build the necessary superstructures. In the event of breach of this obligation, the Minister of Finance shall have the right to terminate the contract with immediate effect, and the concessionaire shall be obliged to pay a penalty of HUF 900 million for the failure.*

3. *Following the coming into effect of the concession contract, until the commencement of the concession (the time stated in the license for the casino), the concessionaire shall be obliged to report to the Minister of Finance every half year, by 15 January and 15 July, regarding the status of the implementation of the King's City project, and the progress made in the previous period. In the event of delay, the concessionaire shall be obliged to pay a penalty of HUF 2.47 million for each day of delay.*

4. *It is to be disclosed that the contract is public.*"¹⁰⁹

137. Mr. Árvai noted that he had requested the Minister's decision "*regarding the deadline for verification of lawful possession of the Sukoró properties*" the previous day.¹¹⁰
138. On 5 October 2009, Mr. Árvai sent a memorandum to Dr. Oszkó reporting on a second meeting with Dr. Bárd regarding the Concession Contract, which had taken place on 1 October 2009. Mr. Árvai noted that Dr. Bárd had suggested a six-month extension of the deadline in Clause 9.3, *i.e.*, until 1 July 2011 instead of 1 January 2011, and had also stated that, in his opinion, "*the attacks against the investment because of Sukoró could be stopped, if the concession contract did not particularize settlements as the location of the casino.*"¹¹¹
139. On 8 October 2009, Mr. Árvai sent a memorandum to Dr. Oszkó, with the Concession Contract attached, referring to the fact that the work pertaining to the Concession Contract had been carried out jointly by his division, the Sector Development and Finance Division, and the Legal and Administrative Division, and requesting that the Minister

¹⁰⁹ Exhibit R-68.

¹¹⁰ Exhibit R-68; Joint Chronology, item 157.

¹¹¹ Exhibit R-72; Joint Chronology, item 165.

sign the counterparts, should he concur that “*there are no legal or statutory obstacles to the execution of the Concession Contract.*”¹¹² Mr. Árvai summarized the parties’ agreement, *inter alia*, that since the Concession Contract limited the right to exercise the concession activities to the locations set out in the Tender, the list of local municipalities that had given their preliminary consent to the Tender was to be attached to the Concession Contract, and the deadline to certify the legitimate possession and document the right to build on the Project Site was to be set at 1 January 2011.¹¹³

140. On 8 October 2009, Dr. Oszkó directed Dr. János Nagy, President of the NVT, to take the relevant measures to restore the original condition existing prior to the land swap transaction, and, in the event that no agreement was concluded with the swap partner, Mr. Blum, by 9 November 2009 at the latest, to take the relevant measures for the MNV to take “*appropriate legal action for establishing the nullity of the swap transaction.*”¹¹⁴
141. On 9 October 2009, KC Bidding and Dr. Oszkó, in his capacity as Minister of Finance, acting on behalf of Hungary, signed the Concession Contract.¹¹⁵ The location of the Project was left open among the 133 settlements listed in the Tender and in Annex 1 of the Concession Contract, including the Sukoró Site.

D. Content of the Concession Contract

142. The Concession Contract was concluded for a term of 20 years, with the option of a further 10 year extension.¹¹⁶
143. Clause 4.2 of the Concession Contract states:¹¹⁷

“The starting date of the concession period shall be the day on which the authority performing state supervision of the activity subject to concession grants to the Concession Company the license stipulated by relevant legislation in force for performing the activity subject to concession.”

¹¹² **Exhibit R-76**; Joint Chronology, item 172.

¹¹³ **Exhibit R-76**; Joint Chronology, item 172.

¹¹⁴ **Exhibit C-121**.

¹¹⁵ **Exhibit C-1**; Joint Chronology, item 174.

¹¹⁶ Memorial, ¶ 61.

¹¹⁷ The Concession Contract was concluded in the Hungarian language. The English translations of the relevant provisions are taken from Claimant’s **Exhibit C-1**. Clause 17.7 of the Concession Contract states that, in case of any dispute or contradiction concerning the meaning or interpretation of the Contract, “*the Hungarian language shall prevail.*”

144. Clause 5 of the Concession Contract states:

“According to the Call for Tender, the activity subject to concession may be exercised within the administrative area of the settlement of the Central-trans Danubian Region listed in Annex I. giving their consent to the Call for tender.”

145. Annex 1 of the Concession Contract lists 133 locations, including the Sukoró Site, where the Project could be situated.

146. Clause 7.1 of the Concession Contract states, in its relevant part:

“The Concession Receiver hereby undertakes to establish a Concession Company [...] within 90 days after signing this Contract. The Concession Company should meet the following requirements at the same time of establishing and throughout the concession period as well:

[...]

7.1.2 The headquarters of the Concession Company shall be located within the territory of the settlement where the activity subject to concession is exercised.”

147. Clause 9.3 of the Concession Contract states:

“Starting from January 1, 2011 up to expiry of the concession period, the Concession Company shall continuously hold the legitimate right to possession of the real properties for establishment of the Casino, to performance of the activities subject to Concession and the Supplementary Activities and/or the portion of those real properties suitable for performance of the activity subject to Concession and the Supplementary Activities and the right to encroachment of the necessary superstructures within the settlement where the activity subject to concession is exercised.”

148. Clause 12.1 of the Concession Contract states:

“As a security for any of its payment obligations arising from this Contract, the Concession Receiver shall ensure from January 1, 2010 for the full concession period without interruption a bank guarantee, security deposit or cash surety.”

149. Clause 12.4 of the Concession Contract states:

“Cash surety may be arranged by the Concession Receiver via a company with proper reputation or a natural person accepted by the Concession Grantor.”

150. Clause 12.5.1 of the Concession Contract states:

“In case the Concession Receiver fails to certify by January, 2011 that the Concession Company holds the legitimate possession of the properties specified in Item 9.3, moreover the right to construction of the necessary superstructure for the period stipulated therein and the Concession Grantor exercises its right to termination on these grounds, then the Concession Receiver shall pay an amount of HUF 900 million as penalty for frustration.”

151. Clause 12.5.5 of the Concession Contract states:

"In case the Concession Receiver fails to perform its reporting obligation determined in Item 14.3 of the present Contract within the respective time limit, it shall pay 2.47 million HUF for each day of said delay."

152. Clause 14.3 of the Concession Contract states:

“After entry into force of this Contract, the Concession Receiver shall furnish written reports to the Concession Grantor every half year by January 15 and July 15, respectively up to commencement of the concession period concerning the status of implementation of the King’s City project and the progress achieved in the previous period.”

153. Clause 15.2.1 of the Concession Contract states, in its relevant part:

“The Concession Grantor shall be entitled to terminate the Contract with an immediate effect, if:

15.2.1.1 the Concession Receiver fails to certify by January 1, 2011 that the Concession Company has legitimate possession of the real properties as in item 9.3 and the right of encroachment of the necessary superstructures for the period stipulated therein, or after certifying, the right of the Concession Receiver for continuous legitimate possession of the real properties pursuant to item 9.3 and its right of encroachment of the necessary superstructures are terminated at any time.

[...]

15.2.1.2 The Concession Receiver does not provide for a due bank guarantee, security deposit, cash security giving security for the payment obligations arising from the Contract on the burden of the Concession Receiver.”

E. From the Conclusion of the Concession Contract to its Termination

1. Land Swap Litigation

154. On 9 October 2009, two hours after signing the Concession Contract, the Ministry of Finance issued a press release stating that Dr. Oszkó had ordered Dr. János Nagy, President of the NVT, to ensure that the MNV start discussions with Mr. Blum regarding the Sukoró land swap “*with the aim of restoration of the original – pre-land-swap-condition.*” The press release also stated that “[f]or the case that discussion will not come to a conclusion within 30 days,” the Minister requested Dr. János Nagy “*to give [an] order to [the] MNV to take the necessary legal steps to invalidate the land-swap contract.*”¹¹⁸ Claimant claims that the Project Sponsors and Claimant were not notified about the Ministry’s instructions or the decision to issue a press release at the signing ceremony and were surprised by its contents;¹¹⁹ the Tribunal notes that the record does not show that there was any reaction from the Project Sponsors, voiced to a representative of Respondent.
155. On 20 October 2009, Dr. Varga met, on Mr. Blum’s behalf, with officials from the MNV, including Dr. Attila Morvai, MNV’s Chief Legal Counsel, to discuss the new situation created by the Treviso appraisal regarding the Pilis Land and the Albertirsa Land that the MNV had received on 1 October 2009. Dr. Morvai stated that he was under instructions to attempt by 9 November 2009, through negotiations, to restore the situation existing prior to the signing of the Land Swap Agreement, *i.e.*, to terminate the Land Swap Agreement and refund to Mr. Blum amounts paid to MNV plus interest. The MNV set a final deadline of 29 October 2009, 11:00 a.m., for Mr. Blum to respond. Dr. Morvai stated that if this deadline was not observed, the issue would be referred to the courts in order to restore the original situation prevailing before the conclusion of the land swap transaction.¹²⁰
156. On 29 October 2009, Mr. Blum and Dr. Varga met with Dr. Miklós Kamarás, the new CEO of the MNV, together with Dr. Morvai and other MNV officials, to discuss a draft cancellation letter that had been prepared pursuant to a direction from the Minister of Finance and, at the request of Mr. Blum, sent to Dr. Varga. By way of introduction, Dr. Kamarás stated his view of the current status: “[A]s of today none of the real estates that appear in the swap agreement signed [sic] at the end of June 2008 were

¹¹⁸ Memorial, ¶ 204; **Exhibit C-128**; Joint Chronology, item 175.

¹¹⁹ Memorial, ¶ 511; Claimant’s Post-Hearing Brief, ¶ 36. Claimant also submits that the press release “*took Mr. Blum completely by surprise.*” Memorial, ¶ 205, quoting Blum I, ¶ 68.

¹²⁰ Memorial, ¶ 209; **Exhibit C-131**; Joint Chronology, item 183.

*not [sic] registered on behalf of the parties of the agreement. At this moment the ownership situation is similar, there is a valid swap agreement, but no modifications in ownership occurred accordingly.”*¹²¹ Mr. Blum disagreed with Mr. Kamarás’ view, claiming that 16 properties had been registered in his name and that the delay in registration of the four remaining properties was the responsibility of the MNV. The parties disagreed on this point, which Dr. Kamarás claimed was irrelevant to the meeting.¹²²

157. Dr. Kamarás referred to the recent valuation from which it appeared that the Pilis Land and Albertirsa Land owned by Mr. Blum had been overvalued. He concluded that, as a result of this new information, he, as the manager of the MNV, had immediately to take the necessary steps to avoid the damage. Dr. Kamarás stated that the MNV had received from the Government “*the mandate to restore the situation to its origins, yet to offer another site for exchange we are not allowed to do so.*”¹²³ Mr. Blum concluded that the purpose of the discussion for him was to minimize his damages and responded that he would send the MNV his proposal for modification of the cancellation agreement within 48 hours.¹²⁴

158. It appears from the record that Mr. Blum did not follow up with the MNV.

159. On 16 November 2009, Dr. Oszkó ordered the MNV to initiate court proceedings “*for the purpose of establishing the nullity of the swap transaction [...] due to a conspicuous disproportionality of value and restoration of the original condition.*” He noted:

*“[S]pecial care must be taken to avoid the establishment of a damage compensation liability on the part of the Hungarian state and for this purpose, you should prudently present that the nullity has occurred due to reasons attributable to Joav Blum.”*¹²⁵

160. On 17 November 2009, Dr. Oszkó reported to Prime Minister Bajnai on the outcome of the internal investigation into the land swap. He stated that:

¹²¹ **Exhibit C-132.**

¹²² **Exhibit C-132.**

¹²³ **Exhibit C-132**; Memorial, ¶ 211.

¹²⁴ **Exhibit C-132**; Joint Chronology, item 186.

¹²⁵ Memorial, ¶ 212; **Exhibit C-133**; Joint Chronology, item 191.

- he was of the opinion that the uncertainty surrounding the existence of a public interest basis for the validity of the legal transaction was not in itself likely to be a sufficient legal foundation for challenging the validity of the transaction before a competent court;
- the judicial expert opinion acquired in the criminal procedure underway at the Central Investigation Department of the Attorney General's Office had to be considered a new factor in the course of the investigation (the market value of the swap properties offered for the state-owned properties was determined to be only HUF 193,876,823 as opposed to HUF 787,400,000 set out in the Land Swap Agreement). Disproportionality between the service rendered and its compensation provided a basis for challenging the Land Swap Agreement and, as a consequence, for establishing its nullity;
- he had requested that the NVT and MNV conduct negotiations with Mr. Blum with a view to terminating the Land Swap Agreement by mutual agreement; however, these negotiations had been unsuccessful because Mr. Blum intended to specify conditions – *e.g.*, the assumption of an unconditional damage compensation liability on behalf of the State, the detailed entitlement and amount of which was not specified in advance – which could not have been accepted; and
- he had directed the NVT to take the relevant measures via the MNV in the court with relevant competency and jurisdiction, to “*establish the nullity*” of the Land Swap Agreement, on the basis of a “*conspicuous disproportionality in value,*” and thereby restore the original condition.¹²⁶

161. On 18 November 2009, the MNV initiated a court case against Mr. Blum before the Fejér County Court (number P 22597/2009) (the “**Land Swap Litigation**”), requesting the court:

“[F]irstly according to Section (2), §200 of the Hungarian Civil Code (CC), secondly according to Section (2), §201 of CC, thirdly according to Section (3), §210 of CC [to] state firstly that the Exchange Contract defined in Section I violates a law provision, secondly that the value difference between the service and the consideration was remarkably great at the time of making the Exchange Contract defined in Section I, thirdly that the contracting parties laboured under the same faulty assumption regarding the exchange value and – as the legal consequence of invalidity for each alternative claim – we

¹²⁶ Memorial, ¶¶ 215-216; **Exhibit C-134**; Joint Chronology, item 192.

*ask the restoration of the original status in accordance with Section (1), §237 of CC.”*¹²⁷

162. The MNV further requested the court to order reimbursement of the difference already paid and cancel any request for registration, cancel any ownership right of Mr. Blum already recorded and register the State’s ownership right instead, and suspend any land registration procedures in progress.¹²⁸
163. In June 2010, the newly elected Prime Minister Orbán appointed Dr. Gyula Budai, a Fidesz Member of Parliament, as the Commissioner of the Prime Minister responsible for the investigation of the unlawful sale and privatization of State lands.¹²⁹ In November 2010, Dr. Budai was appointed “*government commissioner*” with a mandate to examine the use of public funds by central budgetary authorities and State-owned companies.¹³⁰

2. Postponement of the Signing of the Incentive Agreement and Revocation of Special Project Status

a) The Incentive Agreement

164. On 15 October 2009, Ms. Szandrocha, Director for Incentives & After Care at ITD Hungary, wrote to Mr. Blum referring to the need to request Governmental approval prior to the signing of the incentive agreement. Ms. Szandrocha stated that the agreement was ready for signing but “*according to the latest government’s decision, before we take the agreement for governmental approval we have to wait that the situation around te [sic] changing of the plots and the concession gets clarified.*”¹³¹
165. Similarly, on 22 October 2009, Ms. Szandrocha wrote to Mr. Gaye, noting that the Ministry of National Development and Economy had confirmed that “*the signing of the incentive agreement shall be postponed until the legal background of the changing of plots (Albertirsa - Sukoró) becomes clarified.*”¹³²

¹²⁷ Memorial, ¶ 281; Counter-Memorial, ¶ 287; **Exhibit C-273**; Joint Chronology, item 193.

¹²⁸ **Exhibit C-273**.

¹²⁹ Memorial, ¶¶ 241-242; Counter-Memorial, ¶ 241; **Exhibits R-179** and **C-160**; Joint Chronology, item 223.

¹³⁰ Counter-Memorial, ¶ 241; **Exhibit C-155**; Joint Chronology, item 268.

¹³¹ **Exhibit C-187**.

¹³² **Exhibit C-190**; Memorial, ¶ 270; Joint Chronology, item 185.

166. An incentive agreement between Respondent and Claimant was ultimately never signed.¹³³

b) Special Project Status

167. On 13 September 2010, Mr. András Schiffer, the leader of the green liberal Party (LMP) and an opposition Member of Parliament, presented a question to the Government (a so-called “*parliamentary interpellation*”) during the parliamentary session. He asked about the future envisaged by the Government for the Lake Velence region, as well as the priorities of the Government’s development policy, and requested the revocation of Special Project Status that had been granted to facilitate the implementation of the Project in Sukoró.¹³⁴

168. In response, Dr. Gyorgy Matolcsy, Minister of National Economy, stated:

*“There will be no casino at Sukoró. We all know that [...] We know the personal interest of the Prime Minister, he likes the countryside, he likes the silken valleys and gentle hills round the Velence Mountains and Lake Velence [...] This is what we all like. Therefore, there will be no casino town or manufacturing town round the Lake Velence.”*¹³⁵

Minister Matolcsy also announced that he had ordered the revocation of Special Project Status for the Project.¹³⁶

169. On 14 September 2010, Dr. Kardkovács, Deputy State Secretary at the Ministry of National Economy, prepared a proposal for the Government on the revocation of Special Project Status. The draft proposal stated:

*“According to the new plans of the government – based on environmental and touristic considerations – the casino town shall not be implemented at Sukoró. Instead, similarly to developed regions of Western Europe, such developments and changes shall take place which can provide a real possibility of recreation and resting.”*¹³⁷

¹³³ Memorial, ¶ 271.

¹³⁴ Exhibit C-145.

¹³⁵ Exhibit C-181.

¹³⁶ Exhibit C-181.

¹³⁷ Exhibit R-94.

The draft further provided that the public policy aim of the proposal was to put an end to the “*land speculation in the region of Lake Velencei*” and to revoke Special Project Status of the investment planned to be implemented on the outskirts of Sukoró.¹³⁸

170. On 23 September 2010, Special Project Status for the Project was revoked by Government Decree, signed by Prime Minister Orbán.¹³⁹ During the meeting of the Administrative Secretaries of State on 16 September 2010 preceding the revocation, Dr. Róza Nagy, State Secretary at the Ministry of National Economy, presented the proposal as legislation of a “*technical nature*” on the basis that Special Project Status should have been revoked by the previous Government “*further to the land swap agreement lawsuit, because no government could conceivably support the implementation of an investment project on unlawfully obtained land.*”¹⁴⁰
171. On 15 October 2010, Mr. Langhammer wrote to Prime Minister Orbán, expressing his “*disappointment*” at the revocation of Special Project Status and stating: “[I]t is of crucial importance to know that your Government remains committed to the development of this project.” Mr. Langhammer clarified that “*Vigotop Limited Investors (Mr. F H Langhammer, Mr. I Fisher and Mr. R S Lauder), have no connection with the ownership of the Sukoró land.*”¹⁴¹
172. On 18 October 2010, Mr. Benkley, Managing Director of KC Bidding, wrote to Minister Matolcsy expressing “*great surprise*” at the cancellation of Special Project Status without any warning or explanation, asking Minister Matolcsy to “*reconsider [his] decision and to restore the original situation.*”¹⁴²
173. On 21 October 2010, Mr. Gaye also wrote to Dr. Fellegi, Minister of National Development, expressing his “*great surprise*” at the cancellation of Special Project Status and calling upon Minister Fellegi to reconsider the Government’s decision and to restore the original situation.¹⁴³
174. On 4 November 2010, Mr. Péter Szijjártó, spokesman for Prime Minister Orbán, replied to Mr. Langhammer’s letter of 15 October 2010, stating that “*I respectfully suggest we postpone the meeting proposed by you until the appropriate termination of the proceedings put in place by the Hungarian authorities*” in connection with the land

¹³⁸ **Exhibit R-94.**

¹³⁹ Memorial, ¶ 262; Counter-Memorial, ¶ 246; **Exhibit C-182**; Joint Chronology, item 250.

¹⁴⁰ Nagy, ¶ 15.

¹⁴¹ **Exhibit C-152**; Joint Chronology, item 258.

¹⁴² **Exhibit C-299**; Joint Chronology, item 259.

¹⁴³ **Exhibit C-183**; Joint Chronology, item 260.

swap, and noting that “*any meeting between the Prime Minister and those involved would give grounds for the worst assumptions.*”¹⁴⁴

3. Performance of the Concession Contract

a) Submission of Suretyship

175. On 19 November 2009, Dr. Bárd, acting on behalf of KC Bidding, submitted to the Ministry of Finance the declaration of Mr. Lauder on the assumption of joint and several suretyship in accordance with Section 12.4 of the Concession Contract (the “**Suretyship**”) and requested acknowledgement of “*the performance of the foregoing guarantee obligation.*”¹⁴⁵ The Suretyship provided that (i) the guarantee was valid during the period 1 January 2010 to 31 March 2011, (ii) the maximum liability was the sum of HUF 936 million, and (iii) the guarantee could be exercised only in the event that a written demand was provided to KC Bidding, with a copy to Mr. Lauder, detailing the unfulfilled financial undertaking of KC Bidding and providing a 30 day period for such undertaking to be fulfilled.¹⁴⁶
176. On 9 December 2009, Mr. Árvai, from the Ministry of Finance, wrote to Dr. Bárd stating: “*I wish to inform you that the suretyship meets the requirements under paragraph 12.4 of the concession agreement signed between KC Bidding Kft. and the State of Hungary of the 9th of October 2009, no objection has been raised with respect to the identity of the guarantor.*”¹⁴⁷
177. On 25 January 2010, Mr. Benkley wrote to Dr. Oszkó stating that KC Bidding had performed the obligations stipulated under the Concession Contract, including, *inter alia*, the submission of the declaration on the assumption of joint and several suretyship, and requested that the Minister confirm the performance of the obligations.¹⁴⁸

¹⁴⁴ **Exhibit C-153**; Joint Chronology, item 265.

¹⁴⁵ **Exhibit R-78**; Joint Chronology, item 195.

¹⁴⁶ **Exhibit C-204**.

¹⁴⁷ **Exhibit R-79**. This is an amended and certified translation of **Exhibit C-206**, which had been submitted by Claimant and reads in relevant part: “*I wish to inform you that the suretyship is acceptable and no objections have been raised according to paragraph 12.4 of the concession agreement signed between KC Bidding Kft. and the State of Hungary on the 9th of October 2009.*” Joint Chronology, item 197.

¹⁴⁸ **Exhibit R-80**; Joint Chronology, item 204.

178. On 5 March 2010, Dr. Oszkó responded to Mr. Benkley noting that “[n]o objections have been raised with regard to the performance of these contractual obligations, as yet.”¹⁴⁹

b) Establishment of the Concession Company

179. On 11 December 2009, the Concession Company, SDI Europe Kft., was established as a Hungarian company (wholly owned by KC Bidding)¹⁵⁰ in accordance with Article 7.1 of the Concession Contract, with its principal place of business in Székesfehérvár (the “**Concession Company**” or “**SDI Europe**”).¹⁵¹ It was registered by KC Bidding in Székesfehérvár on 21 December 2009.¹⁵²

180. In his letter of 25 January 2010, Mr. Benkley informed Dr. Oszkó that KC Bidding had “*established the concession company (SDI EUROPE Kft, Cg. 07-09-017657) with its registered seat at the administrative territory of the Mid-Transdanubian Region.*”¹⁵³

c) Efforts to Obtain Other Sites

181. Soon after the negotiations between Mr. Blum and the MNV regarding the Land Swap Agreement had failed, the Project Sponsors started to look for alternative sites as a potential location for the Project. On 9 November 2009, Claimant engaged Artonic Design Kft., a local architecture firm, to assist with the search for alternative sites.¹⁵⁴ On 25 February 2010, Claimant engaged Miller Buckfire & Co., LLC (“**Miller Buckfire**”), an investment bank and advisory firm, to assist in finding a strategic investor to join the Project.¹⁵⁵ Claimant has described its search for three sites in some detail, namely at Bábolna, Székesfehérvár and Tatabánya.¹⁵⁶

182. For reasons that will be discussed below, Claimant ultimately did not acquire any of these alternative sites.

¹⁴⁹ **Exhibit R-82**; Joint Chronology, item 209. This is an amended and certified translation of **Exhibit C-205**, which had been submitted by Claimant and reads in relevant part: “*There are no reservations regarding the implementation of the terms of this agreement.*”

¹⁵⁰ KC Bidding, SDI Europe and KC Management are referred to collectively as the “**Project Companies**”.

¹⁵¹ Joint Chronology, item 198.

¹⁵² Memorial, ¶¶ 62, 291; Joint Chronology, item 200.

¹⁵³ **Exhibit R-80**.

¹⁵⁴ Reply, ¶ 69; **Exhibit C-278**; Joint Chronology, item 188.

¹⁵⁵ **Exhibit C-43**; Joint Chronology, item 207.

¹⁵⁶ Memorial, ¶¶ 223-229.

d) Efforts to Meet with Members of the Fidesz Government

183. Following the national elections in April 2010 and the election of Dr. Orbán as Prime Minister on 29 May 2010, the Project Sponsors repeatedly requested meetings with members of the Fidesz Government, including Prime Minister Orbán. For reasons that will be discussed below, none of these requests were successful.
184. The Project Sponsors also repeatedly requested that the new Fidesz Government confirm that it would still support the Project.
185. On 16 September 2010, Mr. Gaye wrote a letter to Mr. Tamás Kocsis, Deputy-Chief of Cabinet in the Ministry of National Development, noting that “*in order to move forward the support of your Ministry is needed*” and seeking clarification as to the Ministry’s attitude toward the Project.¹⁵⁷ According to Claimant, this letter was handed to Mr. Kocsis at a meeting between Messrs. Blum, Gaye and Kocsis on 18 September 2010.¹⁵⁸ Respondent notes that this letter is unsigned and could not be located in the archives of the Ministry of National Development.¹⁵⁹
186. On 24 November 2010, Mr. Langhammer wrote a letter to Prime Minister Orbán, in which he complained about “*a consistent course of conduct by Hungary since late 2009 that appears designed to undermine our legal rights and destroy the King’s City project.*” Mr. Langhammer gave the following examples: (i) the Government refused to sign the agreement providing incentives for the Project Sponsors’ investment; (ii) the Government commenced a series of civil and criminal proceedings against Mr. Blum in connection with the Land Swap Agreement; (iii) the Government appointed a commissioner, Dr. Budai, who had “*continuously and virulently attacked the King’s City project and Vigotop Limited’s investors and has rendered impossible KC Bidding Kft’s attempts to secure legitimate possession of alternative sites for the project*”; (iv) the Government cancelled the Project’s Special Project Status; and (v) the Minister of National Economy demanded that KC Bidding pay penalties following purported violations of the Concession Contract. Mr. Langhammer concluded that, without a “*for-*

¹⁵⁷ **Exhibit C-249.**

¹⁵⁸ Claimant’s Post-Hearing Brief, ¶ 96; Reply, ¶ 87.

¹⁵⁹ Rejoinder, ¶ 176; Joint Chronology, item 245. The Tribunal notes that Respondent does not take this position in its Counter-Memorial, in which it submits: “*On 16 September 2010, Mr. Gaye informed the Ministry of National Development that the Project Sponsors were still ‘busy looking for a new location for the resort in the Central Transdanubian region’. Mr. Gaye requested some ‘clarifications as for the status of the King’s City project and the Ministry’s attitude towards the materialization of the project in Hungary’, but did not otherwise refer to any potential locations that the Project Sponsors might have been considering, or solicit the government’s assistance in securing any particular site.*” Counter-Memorial, ¶ 249.

mal, explicit and immediate assurance that Hungary remains committed to the project, and to fulfilling its obligations and previous assurances in connection with the project, the project will fail,” and requested from the Government

“your written confirmation of the following:

1. That your Government continues to support the King’s City project and intends to do so moving forward (subject to the project meeting all legal requirements);

2. That Hungary will agree to extend by 12 months the 1 January 2011 deadline in the concession agreement for the taking of legitimate possession of an appropriate site for the project. This will require amendment to, inter alia, clause 9.3 and clause 9.4 of the agreement. Such amendments are needed to compensate us for the time lost in connection to the Sukoró land due to factors entirely outside our influence or control;

3. That the Government will reinstate special project status to the King’s City project upon notification of a suitable new site; and

4. That ITD Hungary Zrt will execute the Agreement concerning the State’s grant of HUF 2.6 billion, which ITD Hungary Zrt has already approved, once a suitable new site is found.

In the absence of confirmation of all above points within 14 days of the date of this letter, Vigotop Limited will be constrained to conclude that Hungary is resolved upon the destruction of the project.”¹⁶⁰

187. Respondent did not reply to Mr. Langhammer’s letter of 24 November 2010 within the requested time period of 14 days.

188. On 10 December 2010, Mr. Benkley wrote a letter to Minister Matolcsy, in which he requested that the Minister “agree to extend the 1st January 2011 deadline in Section 9.3 of the concession contract by an additional 12 months from the date when the so called Sukoró court case will be finished with a legally binding decision.” Mr. Benkley further referred to Mr. Langhammer’s letter to Prime Minister Orbán of 24 November 2010 and again requested confirmation that (i) the Government would continue to support the Project; (ii) the Minister would restore Special Project Status “in Sukoró and if needed later, in an alternate site pending the court’s binding decision”; and (iii) ITD Hungary would execute the incentive agreement, “once a legally binding decision on

¹⁶⁰ Exhibit C-154.

Sukoró ha[d] been issued or a suitable alternate site ha[d] been named.” Mr. Benkley requested a written reply within seven days.¹⁶¹

189. On 17 December 2010, Dr. Kardovács, Deputy State Secretary at the Ministry of National Economy, wrote to Mr. Langhammer:

“Thank You for your letter, addressed to the Prime Minister, Dr. Orbán Viktor sent on 24th of November 2010.

[...]

1. The Government of the Hungarian Republic is going to proceed pursuant to the referring and effective legal stipulations and the provisions of the [Concession] agreement.

2. Pursuant to Point 9.3 of the Concession Agreement, the Concessionaire shall perform its obligations referring to the real estate from the 1st of January, 2011. In my opinion, the amendment of the Agreement is not supportable because since the signature, on 9th October, 2009, the Concessionaire – if its intentions referring to the realization of the investment are serious – has had the possibility to purchase the necessary real estates in the area of the 133 settlements, [...] and the Concessionaire still has the opportunity to fulfil this obligation till the 1st of January, 2011.

3. On the Session, hold [sic] on 23rd September, 2010 the Government decided to repeal the Government Decree No 83/2009. (IV.10.) (hereinafter as Government Decree) on giving priority status to the administrative proceedings in connection with the investment of ‘King’s city’ complex tourist project being realized in the periphery of the Municipality of Sukoró. [...]

4. The subsidy in the amount of 2.3 billion HUF was provided for the investor according to the decision of the Economic Cabinet, made on 26th August, 2008. The subsidy agreement prepared by the ITD Hungary Zrt. has not been executed, because first the King’s City Management Kft. asked more times for the postponement of the signature and last the ITD Hungary Zrt. asked therefor [sic] as well. The subsidy offer expired after the last postponement after 3 months following the 31st of August, 2009, so neither the ITD Hungary Zrt. nor the Government cannot [sic] provide the prior offered subsidy.

¹⁶¹ **Exhibit R-101.** In his letter to Minister Matolcsy of 21 December 2010, in which he certified Sukoró as the site for the Project, Mr. Gaye stated that he did not receive any response to his letter of 10 December 2010. **Exhibit C-203.**

[...] Pursuant to Point 12.5.4. of the Concession Agreement the Concessionaire shall pay default penalty in the amount of 2.47 million HUF [...].”¹⁶²

e) Efforts to Certify Sukoró as the Site of the Project

190. The Project Sponsors subsequently decided to present Sukoró as the certified site for the Project. To this end, on 20 December 2010, KC Bidding and SDI Europe entered into an agreement regarding the assignment of specific rights, possession of and the right to build on the Leased Real Properties, based on the Lease Agreement (the “**Assignment Agreement**”),¹⁶³ and, on 21 December 2010, KC Bidding (as transferor) and SDI Europe (as transferee) signed and effected the Handover Protocol relating to the Leased Real Properties.¹⁶⁴

191. On 21 December 2010, Mr. Paul Benkley, Managing Director of KC Bidding, informed Minister Matolcsy that SDI Europe had acquired legitimate possession of, and the right to build on, the Leased Real Properties, and that KC Bidding had accordingly complied with its obligations under Clause 9.3 of the Concession Contract.¹⁶⁵

4. Termination of the Concession Contract

192. Upon receipt of Mr. Benkley’s letter of 21 December 2010, a meeting was held on 6 January 2011 among Dr. Budai, representatives of the Ministry of National Economy, the Ministry of National Development and the Government Control Office and the attorney engaged by Hungary in the pending Land Swap Litigation regarding the letter and the potential grounds for the termination of the Concession Contract.¹⁶⁶ Dr. Kardkovács, the Deputy Secretary of State, and Dr. Körösmezei, the chief head of department, sent a memo regarding the meeting to Minister Matolcsy proposing, *inter alia*, to “*terminate the concession contract with immediate effect and to enforce the state’s claim for a penalty for frustration deriving therefrom*” and attaching a draft termination letter.¹⁶⁷

193. By letter of 10 January 2011, Minister Matolcsy notified Mr. Benkley of the termination of the Concession Contract with immediate effect and requested payment in the

¹⁶² **Exhibit C-234.**

¹⁶³ Memorial, note 41, **Exhibit C-11**; Joint Chronology, item 284.

¹⁶⁴ Counter-Memorial, ¶ 272; **Exhibit R-104**; Joint Chronology, item 285.

¹⁶⁵ Memorial, ¶ 300; **Exhibit C-203**; Joint Chronology, item 287.

¹⁶⁶ **Exhibit R-160**; Joint Chronology, item 291.

¹⁶⁷ **Exhibit R-160.**

amount of HUF 900 million as a cancellation penalty pursuant to Clause 12.5.1 (the “**Termination Letter**”). The Termination Letter was delivered to KC Bidding on 12 January 2011.¹⁶⁸ Minister Matolcsy specified three grounds for the termination of the Concession Contract:

- (i) The concession receiver had failed to comply with Clause 9.3 of the Concession Contract, namely that it must “*hold the legitimate right to possession of the real properties for establishment of the Casino.*” As the Concession Company had been established and registered in Székesfehérvár, which was also its principal place of business, the settlement community indicated by the concession receiver for practicing the concession activity was Székesfehérvár. However, the concession receiver had only filed documents for the purpose of certifying the possession of real properties in Sukoró. This failure served as a basis for the concession grantor’s right to termination with immediate effect pursuant to Clause 15.2.1.1.
- (ii) Even if the concession receiver had specified Sukoró instead of Székesfehérvár as the location for practicing the concession activity, the documents provided did not properly comply with Clause 9.3 of the Concession Contract. According to the deed of ownership, the owner of the real properties in Sukoró was the State of Hungary and not Mr. Blum, who had entered into the Lease Agreement with KC Bidding. The Assignment Agreement between KC Bidding and SDI Europe was therefore null and void and hence could not support legitimate ownership and building rights of SDI Europe with regard to the Sukoró Site.
- (iii) As an independent ground for termination pursuant to Clause 15.2.1.22, Mr. Lauder’s statement of guarantee, which included “*limitations of temporal [...] and pecuniary [...] nature,*” failed to satisfy Clause 12.1 of the Concession Contract, which requires security for the payment obligations arising from the Contract.¹⁶⁹

F. Litigation following the Termination of the Concession Contract

1. Land Swap Litigation

194. In the Land Swap Litigation that had been pending since 18 November 2009, the Fejér County Court at first instance held on 16 December 2011 that the Land Swap Agreement was null and void on the basis that the contractual intent on the part of the Hun-

¹⁶⁸ Joint Chronology, item 297.

¹⁶⁹ **Exhibit C-202; Exhibit R-111.**

garian State was false and that Mr. Blum “*should have known*” this. For this reason, the public interest requirement set out in Section 13(4) of the National Land Fund Act for the avoidance of a public tender was absent. The Court further held that the Sukoró Site should have been acquired by way of a public tender and that the Land Swap Agreement was therefore concluded in breach of Section 13(1) of the National Land Fund Act.¹⁷⁰ In addition, the Court found that the Land Swap Agreement was void under Section 201(2) of the Civil Code “*due to the grossly unfair difference between the value of the services and the value of the consideration.*”¹⁷¹

195. On 20 January 2012, Mr. Blum filed an appeal against the decision of the Fejér County Court with the Metropolitan Court of Appeal.
196. On 13 June 2012, the Metropolitan Court of Appeal upheld the FÉjér County Court’s decision and dismissed Mr. Blum’s appeal. It held that the Land Swap Agreement was null and void on the basis that the parties had sought to circumvent Section 13(1) of the National Land Fund Act, as the parties’ real intention was not to secure a site for the road project, but rather to ensure that the Sukoró Site could be acquired by Mr. Blum without a public tender. The public interest requirement was therefore absent. As regards the contractual intent of the parties, the Metropolitan Court of Appeal stated: “*The contractual intention of the parties was not sham, therefore the contract itself is not a sham contract.*”¹⁷²
197. On 16 July 2012, Mr. Blum filed a request for an extraordinary revision procedure with the *Curia*, the Supreme Court of Hungary.¹⁷³
198. On 13 November 2012, the *Curia* affirmed the previous decisions of the Fejér County Court and the Metropolitan Court of Appeal, ordering the restoration of the original conditions existing prior to the swap and declaring the Land Swap Agreement null and void.¹⁷⁴ It decided on the basis that the swap was not justified because the criteria under Section 13(4) of the National Land Fund Act are not met where the properties in question are only partially affected by the infrastructure development and that the effect of the M4 motorway on Mr. Blum’s properties, *i.e.*, the Albertirsa Land and the Pilis Land, was “*minimal.*”¹⁷⁵ As the *Curia* confirmed that the Land Swap Agreement

¹⁷⁰ Counter-Memorial, ¶ 289; **Exhibit R-127**; Joint Chronology, item 329.

¹⁷¹ **Exhibit R-127**.

¹⁷² **Exhibit R-129**; Joint Chronology, item 339.

¹⁷³ Counter-Memorial, ¶ 301.

¹⁷⁴ Counter-Memorial, ¶ 301; **Exhibit R-131**.

¹⁷⁵ Joint Chronology, item 347.

was null and void, it did not consider it necessary to examine the merits of the other reasons of invalidity.¹⁷⁶

2. Concession Contract Litigation

199. On 23 February 2011, Respondent, represented by the Ministry of National Economy, commenced court proceedings against KC Bidding, as party to the Concession Contract, and Mr. Lauder, as guarantor of the obligations of KC Bidding pursuant to the Suretyship,¹⁷⁷ before the Metropolitan Court of Budapest, seeking payment of the accrued contractual penalties payable under Clauses 12.5.1 (termination for breach of Clause 9.3)¹⁷⁸ and 12.5.5 (breach of reporting obligations under Clause 14.3)¹⁷⁹ of the Concession Contract (the “**Penalty Proceedings**”).¹⁸⁰
200. On 30 March 2011, KC Bidding commenced parallel proceedings against Respondent in the Central Court of Pest District, requesting a declaration that the termination of the Concession Contract was unlawful (the “**Termination Proceedings**”).¹⁸¹
201. On 10 August 2011, KC Bidding filed a request for the suspension of the Penalty Proceedings. On 15 August 2011, Mr. Lauder also filed a request for the suspension of the Penalty Proceedings. On 22 August 2012, this request was granted by the court.¹⁸² On 5 September 2012, Respondent appealed the suspension order of 22 August 2012.¹⁸³
202. On 19 September 2012, Mr. Lauder requested to be joined to the Termination Proceedings as an intervenor on behalf of KC Bidding; his request was granted on the same day.¹⁸⁴

¹⁷⁶ **Exhibit R-131**, p. 23.

¹⁷⁷ In the Termination Letter, Respondent had stated that the Suretyship failed to satisfy the provisions of Clause 12.1 of the Concession Contract and claimed this breach as one of the grounds for the termination thereof. *See* ¶ 195 (iii) above.

¹⁷⁸ In the Termination Letter, Respondent had requested that KC Bidding pay an amount of HUF 900 million as frustration penalty. **Exhibit R-111**. On 10 January 2011, the date of the Termination Letter, Respondent issued demands for payment to KC Bidding and to Mr. Lauder. **Exhibits R-112** and **R-113**.

¹⁷⁹ On 29 October 2010, Respondent had notified KC Bidding of its failure to comply with its reporting obligations specified under Clause 14.3 of the Concession Contract and requested payment of the default penalty under Clause 12.5.5 thereof. **Exhibit R-98**. In addition, on 7 January 2011, Respondent again requested KC Bidding to make payment of penalties and interest for late performance. **Exhibit C-209**.

¹⁸⁰ Reply, ¶ 117; **Exhibit R-120**; Counter-Memorial, ¶ 283; Joint Chronology, item 307.

¹⁸¹ Reply, ¶ 117; Counter-Memorial, ¶ 284.

¹⁸² Reply, ¶ 118; Counter-Memorial, ¶ 284.

¹⁸³ Reply, ¶ 118; Counter-Memorial, ¶ 284. At the time the Reply was submitted, the appeal was still pending before the Metropolitan Court of Appeal. Reply, ¶ 118.

¹⁸⁴ Counter-Memorial, ¶ 285.

203. On 21 November 2012, Mr. Lauder requested the joinder of TWC to the Termination Proceedings; this request was also granted.¹⁸⁵

V. POSITIONS OF THE PARTIES

A. Claimant's Contentions and Relief Sought

1. Summary of Claimant's Contentions

204. Claimant submits that Respondent has taken a series of unlawful measures in breach of Article 4 of the Cyprus-Hungary BIT, culminating in the cancellation of the Concession Contract on 10 January 2011. These measures include (but are not limited to) "*the Respondent's acts and omissions preventing the Claimant from securing the land required for the Project, the Respondent's frustration of the Claimant's attempts to find alternative land, the Respondent's withdrawal of a package of incentives it had offered to the Project, and the revocation of the Special Project Status.*"¹⁸⁶ Claimant claims that it has incurred losses as a result of such breach and seeks compensation from Respondent.

205. Claimant contends that the termination of the Concession Contract amounted to an expropriation within the meaning of Article 4 of the Treaty in that the termination "*rendered the Claimant's realization of the value of its investment in the King's City Project impossible*"¹⁸⁷ and was, together with the Respondent's "*many [other] unlawful acts,*" not justified because there was no "*reasonable relationship of proportionality between the charge or weight imposed*" on Claimant "*and the aim sought to be realized*" by Respondent.¹⁸⁸

206. More specifically, Claimant submits that by virtue of these measures, Respondent acted "*arbitrarily, inconsistently, without transparency, lacking good faith and in violation of the Claimant's legitimate investment-backed expectations.*"¹⁸⁹ In this context, Claimant relies on investment treaty jurisprudence in its submission that violations of other standards of investment protection, such as the fair and equitable treatment (FET) standard (Article 3(1) of the Treaty), protection against unreasonable and discriminato-

¹⁸⁵ Reply, ¶ 331; **Exhibit C-377**; Counter-Memorial, ¶ 285; Joint Chronology, item 348.

¹⁸⁶ Memorial, ¶ 678. Cf. RfA, ¶ 60.

¹⁸⁷ Memorial, ¶ 525.

¹⁸⁸ Memorial, ¶ 542.

¹⁸⁹ Memorial, ¶ 514; cf. ¶¶ 493-521.

ry measures (also Article 3(1)) and the full security and protection standard (Article 3(2)) may inform the Tribunal’s analysis of unlawful expropriation.¹⁹⁰

207. Further, Claimant relies on the principles of good faith and *pacta sunt servanda*, which, Claimant contends, constitute fundamental principles of international law that “*inform all of these treaty standards.*” Claimant is of the view that Respondent’s conduct manifestly violated those principles and submits that the absence of good faith may indicate that there has been a breach of one or more of the standards of investment treaty protection, including expropriation.¹⁹¹
208. Claimant contends that Respondent has breached the above principles in particular by;
- (i) the “*severe lack of transparency [which] tainted the Respondent’s conduct in general, both in the lead up to and after the signature of the Concession Contract,*”¹⁹² including the issue of a press release immediately following signature of the Concession Contract, announcing Respondent’s aim to restore the original ownerships of the properties exchanged pursuant to the Land Swap Agreement;¹⁹³
 - (ii) the initiation of court proceedings in order to nullify the Land Swap Agreement¹⁹⁴ and the initiation of criminal investigations against former officials who had been associated with the Project;¹⁹⁵
 - (iii) the refusal of ITD Hungary to sign an incentive agreement;¹⁹⁶
 - (iv) the revocation of Special Project Status;¹⁹⁷
 - (v) the “*stonewalling of the Project Sponsors*” by refusing to meet with them throughout 2010;¹⁹⁸
 - (vi) the refusal to extend the contractual deadline for securing a site for the Project;¹⁹⁹

¹⁹⁰ Memorial, ¶ 493; *cf.* Claimant’s Post-Hearing Brief, ¶ 33.

¹⁹¹ Memorial, ¶ 494.

¹⁹² Memorial, ¶¶ 511-512.

¹⁹³ Claimant’s Post-Hearing Brief, ¶ 48.

¹⁹⁴ Memorial, ¶ 505.

¹⁹⁵ *Cf.* Reply, ¶¶ 573 *et seq.*

¹⁹⁶ Memorial, ¶ 503.

¹⁹⁷ Memorial, ¶ 504.

¹⁹⁸ Claimant’s Post-Hearing Brief, ¶¶ 78 *et seq.*

¹⁹⁹ Claimant’s Post-Hearing Brief, ¶¶ 91 *et seq.*

- (vii) the attempt by Respondent to justify its conduct with allegations of corruption and scandal;²⁰⁰
 - (viii) the failure of Respondent's authorities to properly complete the tract formation procedure concerning the Sukoró Site;²⁰¹ and
 - (ix) the termination of the Concession Contract on the basis of "*improper and invalid reasons*"²⁰² which were in part "*the result of the Respondent's own culpable actions and omissions,*" namely the acts and omissions that "*thwarted Mr. Blum's efforts to register his ownership of the land*" and the frustration of "*the Project Sponsors' attempts to secure an alternative site for the Project.*"²⁰³
209. Claimant further submits that Respondent carried out an "*aggressive media campaign*" against Claimant, the Project Sponsors and the King's City Project following the national elections in April 2010.²⁰⁴
210. Claimant relies on the concept of a "*creeping expropriation*" and submits that the Tribunal must examine each of Respondent's acts against the broader chronology of events. Claimant submits that Respondent's actions destroyed Claimant's legitimate investment-backed expectations and that their cumulative effect constituted an expropriation.²⁰⁵
211. It is Claimant's submission that, when viewed in their totality, Respondent's actions support the conclusion that Respondent acted in its sovereign capacity, rather than as an ordinary commercial counterparty.²⁰⁶
212. Claimant further submits that in determining whether there has been an expropriation within the meaning of the Cyprus-Hungary BIT, the Tribunal "*must exercise its own judgment,*" irrespective of the legality of the Respondent's acts and omissions under Hungarian domestic law,²⁰⁷ particularly with regard to the outcome of the Land Swap Litigation and the Termination Proceedings before the Hungarian courts. Claimant

²⁰⁰ Claimant's Post-Hearing Brief, ¶¶ 99 *et seq.*

²⁰¹ Memorial, ¶ 505.

²⁰² Memorial, ¶¶ 506-510.

²⁰³ Memorial, ¶ 509.

²⁰⁴ *Cf.* Memorial, ¶ 513.

²⁰⁵ Claimant's Post-Hearing Brief, ¶¶ 134, 118 *et seq.*

²⁰⁶ *Cf.* Claimant's Post-Hearing Brief, ¶¶ 144 *et seq.*

²⁰⁷ Reply, ¶¶ 368-369.

contends that it is a fundamental principle of international law that a State cannot excuse its breach of international law by reference to its own domestic laws.²⁰⁸

213. Claimant submits that Respondent's measures, in depriving Claimant of its investment, violate Article 4 of the Treaty because Respondent has failed to satisfy any of the four conditions for a lawful expropriation under Article 4(1) (a)-(d) of the Treaty. Claimant contends that Respondent's measures were "*contrary to the public interest*," "*did not provide due process of law*," "*were discriminatory*" and "*made no provision for the payment of just compensation in respect of the expropriation of Vigotop's investment*."²⁰⁹
214. Claimant seeks compensation for losses in the amount of not less than EUR 312.6 million (using the trading multiples approach), EUR 293.5 million (using the income approach) or EUR 278.3 million (using the comparable transactions approach), depending on the valuation methodology that the Tribunal chooses to apply.²¹⁰ Claimant submits that under customary international law, reparation must, so far as possible, wipe out all consequences of the illegal act and re-establish the situation which would, in all probability, have existed if the wrongful act had not been committed. This is the principle set out in the *Chorzów Factory* case,²¹¹ which Claimant claims is also incorporated in Article 31(1) of the ILC Articles.²¹²
215. Claimant also refers to the Cyprus-Hungary BIT, which provides a standard for compensation in the event of expropriation. Article 4(2) provides that "*the amount of compensation must correspond to the market value of the expropriated investment at the moment of expropriation*."²¹³
216. Nevertheless, Claimant submits that the preponderance of international awards and judgments have recognized that a different standard of compensation applies to lawful and unlawful expropriations. It argues that, following the decision of the tribunal in *ADC v. Hungary* which concerns unlawful expropriation under the Treaty, the standard under customary international law should apply.²¹⁴

²⁰⁸ Reply, ¶ 22.

²⁰⁹ Memorial, ¶¶ 548-549.

²¹⁰ Claimant's Post-Hearing Brief, ¶ 424.

²¹¹ Memorial, ¶ 600; *The Factory at Chorzów (Germany v. Poland)*, 1928 P.C.I.J. (ser. A) No. 17 (13 September 1928), **Exhibit CLA-59**, p. 47.

²¹² Memorial, ¶ 601.

²¹³ Memorial, ¶ 607.

²¹⁴ Memorial, ¶ 609; *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award (2 October 2006), **Exhibit CLA-5**, ¶¶ 479-500.

217. Accordingly, Claimant claims that it is entitled to the fair market value of its investment, valued at the latest on 10 January 2011, the date of Respondent's formal termination of the Concession Contract.²¹⁵
218. On the recommendation of its expert, Dr. Abdala of Compass Lexecon, Claimant bases the valuation of the fair market value of its investment on the discounted cash flow, or DCF, method as the "*most appropriate way to calculate*" it.²¹⁶ This valuation is calculated on the basis of the Project Business Plan, dated August 2009 and prepared by TWC,²¹⁷ which, according to Claimant, is "*the most accurate indication of both Claimant's and Respondent's expectations as to the commercial value of the Project.*"²¹⁸ Dr. Abdala generated a model of the future income streams that would have arisen from the Project and discounted these to net present value as of the valuation date using a discount rate plus a pre-operational risk premium.²¹⁹
219. Dr. Abdala thus concluded that the fair market value of the Project to Vigotop as of 10 January 2011 would have been EUR 293.5 million, based on its 75% shareholding in KC Bidding and its 100% shareholding in KC Management.²²⁰ In the alternative, Dr. Abdala submitted a valuation of Vigotop's investment as EUR 312.6 million (based on a comparison of peer companies, expressed as a multiple of EV/EBITDA²²¹) or EUR 278.3 million (based on comparable transactions).

2. Claimant's Request for Relief

220. In the Reply, Claimant requests that the Arbitral Tribunal render an award:²²²
- (i) declaring that Respondent has violated Article 4 of the Treaty in respect of Claimant's investment in the Project;
 - (ii) ordering that Respondent pay to Claimant compensation in the amount of not less than EUR 312.6 million, EUR 293.5 million or EUR 278.3 million (based on any of the three standard valuation methodologies), net of any taxes applied by Hungary;

²¹⁵ Memorial, ¶ 616.

²¹⁶ Memorial, ¶ 619.

²¹⁷ Memorial, ¶ 642. Respondent claims that there is no evidence that the Project Business Plan was ever shared with Respondent, other than statements of Messrs. Gaye and Blum. Counter-Memorial, note 815.

²¹⁸ Memorial, ¶ 642.

²¹⁹ Memorial, ¶¶ 692-693.

²²⁰ Memorial, ¶ 722.

²²¹ Defined as Enterprise Value/Earnings Before Interest, Taxes, Depreciation and Amortization.

²²² Reply, ¶ 864. Claimant did not amend its Request for Relief in its Post-Hearing Brief, *cf.* ¶ 424.

- (iii) ordering that Respondent pay interest on the amount that the Tribunal orders Respondent to pay to Claimant as damages, at the three-month EURIBOR rate plus 4%, compounded on a quarterly basis, until full payment of the damages awarded to Claimant is effectively made by Respondent;
- (iv) ordering that Respondent pay the costs of the arbitration, including all the fees and expenses of ICSID and the Tribunal and all legal costs and expenses incurred by Claimant, with interest calculated in accordance with the preceding paragraph; and
- (v) ordering such other relief as the Tribunal deems appropriate.

B. Respondent's Contentions and Relief Sought

1. Summary of Respondent's Contentions

- 221. Respondent submits that Hungary did not expropriate Claimant's investment but rather fully complied with its obligations under both domestic law and the Treaty.²²³
- 222. Respondent contends that recourse to Treaty standards other than Article 4 of the Cyprus-Hungary BIT is not permitted in assessing expropriation claims under this provision, as Articles 3 and 4 of the Treaty provide for different and separate Treaty standards and Article 7 unambiguously restricts the Tribunal's jurisdiction to expropriation claims.²²⁴
- 223. With regard to the alleged expropriation of Claimant's investment, Respondent submits that the Concession Contract gave Respondent a contractual right of termination, which Respondent, acting as an ordinary contracting party, invoked on 10 January 2011.²²⁵ Respondent claims that, as Claimant was free to dispute the legality of the termination and has in fact done so by bringing proceedings for wrongful termination before the Hungarian courts, there can be no finding of an expropriation, on the grounds that Claimant's contractual remedies remain available.²²⁶

²²³ Counter-Memorial ¶¶ 304-458.

²²⁴ Counter-Memorial ¶¶ 317-334.

²²⁵ Counter-Memorial, ¶ 341; *cf.* Respondent's Post-Hearing Brief, ¶¶ 213 *et seq.*

²²⁶ Counter-Memorial, ¶ 341.

224. Respondent contends that, in any event, it terminated the Concession Contract in accordance with both its terms and Hungarian law and that the termination of the Concession Contract therefore cannot constitute an expropriation.²²⁷
225. In particular, Respondent argues that Mr. Blum could not have acquired valid legal title to the Sukoró Site constituting “*legitimate possession*”; no rights or obligations could be derived from the Land Swap Agreement because it was, as now confirmed by the *Curia*, null and void *ab initio*.²²⁸ Respondent further submits that the suspicious conditions in which the Land Swap Agreement was concluded explain why Hungary considered the Land Swap Agreement to be invalid even prior to the confirmation by a court decision.²²⁹
226. Respondent contends that it did not cause the grounds for termination in any way. Respondent submits that KC Bidding failed to secure a Project site in Sukoró for reasons unrelated to Respondent and claims that the Project Sponsors were aware from the outset of the likely unavailability of the Sukoró Site but nevertheless chose it as the Project site for reasons unknown to Respondent.²³⁰
227. Respondent claims that Dr. Oszkó acted transparently during the preparation and conclusion of the Concession Contract, particularly with regard to the Land Swap Agreement,²³¹ and that the Project Sponsors were kept informed of all relevant developments.²³²
228. With regard to Claimant’s argument that the termination was a disproportionate response to what were relatively minor contractual breaches, Respondent argues that Claimant’s breach related to one of KC Bidding’s core obligations under the Concession Contract, namely to find an appropriate site for the Project.²³³
229. In response to the alleged violations of the good faith principle by its pre-termination conduct, Respondent submits that its conduct was at all times in good faith, and that none of Respondent’s acts deprived Claimant of its investment.²³⁴

²²⁷ Counter-Memorial, ¶ 342.

²²⁸ Counter-Memorial, ¶ 371; *cf.* ¶¶ 286-303.

²²⁹ Respondent’s Post-Hearing Brief, ¶ 90.

²³⁰ Rejoinder, ¶ 301.

²³¹ Counter-Memorial, ¶ 423.

²³² Rejoinder, ¶ 341.

²³³ Rejoinder, ¶ 404.

²³⁴ Rejoinder, ¶ 337.

230. In relation to the failed tract formation procedure, Respondent claims that while Claimant may have experienced some inefficiency as regards the administrative process of the Hungarian bureaucracy, these problems did not rise to the level of a violation of any provision of the Treaty, let alone expropriation.²³⁵ In any event, the need for the tract formation procedure derived from the Land Swap Agreement, which was found null and void *ab initio* by the Hungarian courts; any issue that arose out of the tract formation procedure was thus rendered moot.²³⁶
231. Respondent further submits that Claimant's claimed expectations relating to the financial incentive package offered to the Project Sponsors and the Special Project Status are baseless. ITD Hungary's incentive proposal was premised on the implementation of the Project at Sukoró and remained subject to the final approval of the Government.²³⁷ Similarly, Special Project Status would only have been applicable if the Project had proceeded at Sukoró.²³⁸
232. With regard to Claimant's submissions on the alleged media campaign, Respondent contends that those events cannot be attributed to Respondent.²³⁹ Respondent asserts that the investigations relating to the Land Swap Agreement did not target the Project and had no bearing on Respondent's decision to terminate the Concession Contract.²⁴⁰ As regards the legislative changes allegedly aimed at destroying the Project, Respondent similarly asserts that they did not target Claimant or the Project and did not contribute in any way to the alleged expropriation of Claimant's investment.²⁴¹
233. In response to Claimant's contention that the Project could not have been realized without active State support, Respondent submits that there is no obligation under international law to actively support foreign investments and contends that omissions, however egregious, are not sufficient to constitute an expropriation.²⁴²
234. With regard to Claimant's submissions on quantum, Respondent answers that Claimant is not entitled to any compensation.²⁴³ According to Respondent, Claimant has not met its burden of showing that the allegedly lost future profits were "*probable*."²⁴⁴ As

²³⁵ Counter-Memorial, ¶ 430.

²³⁶ Counter-Memorial, ¶ 431.

²³⁷ Rejoinder, ¶ 359.

²³⁸ Counter-Memorial, ¶ 444.

²³⁹ Counter-Memorial, ¶ 452.

²⁴⁰ Counter-Memorial, ¶ 448.

²⁴¹ Counter-Memorial, ¶¶ 456-457.

²⁴² Respondent's Post-Hearing Brief, ¶¶ 272, 274.

²⁴³ Counter-Memorial, ¶ 459.

²⁴⁴ Counter-Memorial, ¶ 461.

of 10 January 2011, the King's City Project was nothing more than a desktop conceptual study, unsupported by any market data or feasibility study.²⁴⁵

235. Respondent submits that the Project only had a remote chance of materializing because (i) there is no proven, existing market for a mega-casino resort in Europe; (ii) the Project Sponsors had no expertise in developing and operating a casino and failed to find a strategic partner interested in investing in and operating the Project; and (iii) the Project might not have been “bankable,” especially in light of the financial crisis.²⁴⁶
236. Nor, according to Respondent, has Claimant met its burden of proving the quantum of its alleged loss.²⁴⁷ Respondent submits that the DCF method is consistently rejected as a methodology, to value undeveloped projects, such as King's City, that are not going concerns and lack a record of profitability.²⁴⁸
237. In addition, Dr. Abdala's DCF method contains flaws which, when corrected, yield a much lower fair market value, if not a negative value.²⁴⁹ These include overly optimistic revenue projections,²⁵⁰ understated projections of development and operating costs,²⁵¹ and a discount rate that ignores the Project's high risk of failure.²⁵²
238. With respect to the alternative valuations, Respondent submits that the market-based valuations offer no validation for Dr. Abdala's valuation opinion.²⁵³ Respondent claims that the comparator companies and transactions are insufficiently similar to the investment to be valued²⁵⁴ and the trading multiples valuation is circular.²⁵⁵
239. Respondent argues that Dr. Abdala's valuation opinion is contradicted by contemporaneous arm's length-transactions, such as the 2009 Dream Island Transaction in Budapest and the proposed Euro Vegas project in 2007, the Miller Buckfire engagement letter with Vigotop, the Concession Contract itself and the 2008 Option Agreement between Vigotop and ACC, the minority shareholder in KC Bidding.²⁵⁶

²⁴⁵ Counter-Memorial, ¶ 462.

²⁴⁶ Counter-Memorial, ¶¶ 461-482.

²⁴⁷ Counter-Memorial, ¶ 483.

²⁴⁸ Counter-Memorial, ¶ 489.

²⁴⁹ Counter-Memorial, ¶ 502.

²⁵⁰ Counter-Memorial, ¶¶ 503-507.

²⁵¹ Counter-Memorial, ¶¶ 508-513.

²⁵² Counter-Memorial, ¶¶ 514-517.

²⁵³ Counter-Memorial, ¶ 525.

²⁵⁴ Counter-Memorial, ¶ 527.

²⁵⁵ Counter-Memorial, ¶ 531.

²⁵⁶ Counter-Memorial, ¶¶ 533-546.

240. Finally, Respondent submits that in any event Claimant failed to mitigate its loss, a duty firmly established under international law.²⁵⁷

2. Respondent's Request for Relief

241. In its Rejoinder, Respondent requests that the Arbitral Tribunal issue an award:²⁵⁸

- (i) dismissing Claimant's claims in their entirety;
- (ii) declaring that Respondent did not expropriate Claimant's investment in Hungary;
- (iii) ordering Claimant to bear all costs incurred by Respondent in connection with this arbitration, including without limitation the fees and expenses of the members of the Tribunal, attorneys' fees, fees of expert witnesses, and the charges for use of the facilities of the Centre; and
- (iv) ordering any further relief that it may deem appropriate.

VI. THE TRIBUNAL'S REASONING

242. By way of introduction, the Tribunal wishes to emphasize that it has carefully reviewed all of the arguments and evidence presented by the Parties during the course of these proceedings. Although the Tribunal may not address all such arguments and evidence in full detail in its reasoning below, the Tribunal has nevertheless considered and taken them into account in arriving at its decision.

A. Jurisdiction

1. General Jurisdictional Requirements

243. The Parties do not dispute that the Tribunal's jurisdiction derives from Article 25 of the ICSID Convention in connection with the relevant provisions of the Treaty.

244. Article 25 of the ICSID Convention provides, in its relevant part:

“(1) 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 Con-

²⁵⁷ Counter-Memorial, ¶¶ 547-551.

²⁵⁸ Rejoinder, ¶ 576; Respondent did not amend its Request for Relief in its Post-Hearing Brief, *cf.* ¶ 376.

tracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

(2) ‘National of another Contracting State’ means:

(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.”

245. Article 25 of the ICSID Convention sets out four requirements for the Tribunal to have jurisdiction: (i) the existence of a legal dispute; (ii) a dispute arising directly out of an “investment”; (iii) a dispute between a Contracting State and a national of another Contracting State; and (iv) the existence of the written consent of both Parties. It is common ground between the Parties that all four conditions are met in the present case.

a) Existence of a Legal Dispute

246. The Parties agree that there is a legal dispute relating to Respondent’s alleged violations of the Treaty and Claimant’s claimed corresponding right to compensation for the losses it incurred as a result of such violations.

b) Dispute Arising Directly Out of an Investment

247. Article 25 of the ICSID Convention does not define the term “investment”; however, a definition can be found in Article 1(1) of the Treaty which reads in its relevant part:

“1. The term ‘investments’ shall comprise every kind of asset connected with the participation in companies and joint ventures, more particularly, though not exclusively:

[...]

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

[...].”

248. The Parties do not dispute that Claimant’s investment in the territory of Respondent consisted of its shareholdings in its two Hungarian subsidiaries, KC Bidding (in which it held 75% of the shares) and KC Management (in which it held 100% of the shares), as well as KC Bidding’s rights under the Concession Contract.²⁵⁹
249. The Tribunal notes that Claimant submits that its investment further consisted of a series of contracts and other rights related to the Project, and in particular contends that “*KC Bidding also held contractual rights to the Sukoró site by virtue of the Land Swap Agreement and associated Lease Agreements, which [...] remained valid at the valuation date,*”²⁶⁰ whereas Respondent is of the view that Claimant’s investment is limited to the assets set out in the previous paragraph.²⁶¹ With regard to its jurisdiction, the Tribunal considers it sufficient that the Parties agree that Claimant has indeed made an investment within the meaning of Article 1(1) of the Treaty, which comprises (at least) its shareholdings in KC Bidding and KC Management and KC Bidding’s rights under the Concession Contract.
250. Further, it is not disputed that Claimant is an investor within the meaning of Article 1(3)(b) of the Treaty which provides that the term “*investor*” includes “*legal persons constituted or incorporated in compliance with the law of that Contracting Party.*” It is undisputed that Claimant was incorporated on 25 October 2008 and is a legal person constituted in accordance with the laws of Cyprus.²⁶²
251. The Parties agree that the Treaty does not protect “*investors*” independently of their “*investment,*” nor does it protect a “*right to invest.*”²⁶³ Claimant confirms that it does not seek relief for the violation of any “*right to invest,*” but that its claim relates only to Respondent’s alleged deprivation of investments that had already been made before Respondent’s alleged misconduct took place.²⁶⁴

²⁵⁹ Memorial, ¶¶ 426-427; *cf.* Claimant’s Post-Hearing Brief, ¶ 20; Respondent’s Post-Hearing Brief, ¶ 210.

²⁶⁰ Claimant’s Post-Hearing Brief, ¶ 23.

²⁶¹ *Cf.* Respondent’s Post-Hearing Brief, ¶ 210.

²⁶² Memorial, ¶¶ 424-425.

²⁶³ Claimant’s Post-Hearing Brief, ¶ 26; Respondent’s Post-Hearing Brief, ¶ 210.

²⁶⁴ Claimant’s Post-Hearing Brief, ¶ 28.

252. It is therefore undisputed that, with regard to Claimant's shareholdings in KC Bidding and KC Management, as well as KC Bidding's rights under the Concession Contract, the legal dispute between the Parties arises directly out of an investment within the meaning of Article 25(1) of the ICSID Convention.

c) Dispute Between a Contracting State and a National of Another Contracting State

253. It is also common ground between the Parties that the dispute is between a Contracting State to the ICSID Convention and a national of another Contracting State. Hungary is a Contracting State for the purposes of Article 25(1) because Hungary ratified the ICSID Convention on 4 February 1987 and the Convention entered into force for Hungary on 6 March 1987. Vigotop is a national of another Contracting State within the meaning of Article 25(1) of the ICSID Convention and in accordance with the nationality requirement set out in Article 1(3)(b) of the Cyprus-Hungary BIT, because it is a company constituted under the laws of Cyprus. Cyprus ratified the ICSID Convention on 25 November 1966, and it came into force for Cyprus on 25 December 1966.²⁶⁵

d) Existence of the Written Consent of Both Parties

254. Both Parties have consented in writing to submit their dispute to the ICSID for arbitration. Respondent gave its consent in writing by way of Article 7 of the Cyprus-Hungary BIT, such consent becoming effective upon the entry into force of the Treaty on 25 May 1990, prior to the actions/omissions of Respondent giving rise to this dispute.²⁶⁶ Article 7 provides that an investor may request arbitration of the dispute if it cannot be settled "*within six months from the date either party requested amicable settlement.*" Claimant complied with Article 7 by notifying Respondent of the dispute in writing on 17 January 2011 and inviting Respondent to settle the dispute amicably. Claimant then submitted the dispute to arbitration after the expiry of the cooling-off period, namely on 18 July 2011.²⁶⁷ In submitting its Request for Arbitration on 18 July 2011, Claimant consented in writing to submit the dispute to the ICSID for arbitration.²⁶⁸

255. As all four requirements are met in this case, the Tribunal's jurisdiction over the present case has been established on the basis of Article 25 of the ICSID Convention and Articles 1 and 7 of the Cyprus-Hungary BIT.

²⁶⁵ Memorial, ¶ 442.

²⁶⁶ Memorial, ¶¶ 432-433.

²⁶⁷ Memorial, ¶¶ 438-443.

²⁶⁸ RfA, ¶ 31.

2. Scope of Jurisdiction

256. The Parties agree that the scope of the Tribunal's jurisdiction is determined by Article 7 of the Treaty, which provides:

“1. Any dispute between either Contracting Party and the investor of the other Contracting Party concerning expropriation of an investment shall, as far as possible, be settled by the disputing parties in an amicable way.

If such dispute cannot be settled within six months from the date either party requested amicable settlement, it shall, upon request of the investor, be submitted to one of the following:

- (a) The Arbitration Institute of the Arbitral Tribunal of the Chamber of Commerce in Stockholm;*
- (b) the Arbitral Tribunal of the International Chamber of Commerce in Paris;*
- (c) the International Centre for the Settlement of Investment Disputes in case both Contracting Parties have become members of the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States.”*

257. There is no dispute between the Parties that Article 7 of the Treaty limits the Tribunal's jurisdiction to the consideration of claims relating to expropriation.²⁶⁹ Claimant also confirms that, although it is of the view that non-expropriation standards of protection under the Treaty or under customary international law may be relevant to the finding of an expropriation, it does not raise any separate cause of action in relation to such non-expropriation standards.²⁷⁰

258. The Tribunal notes Respondent's view that, in adjudicating claims of unlawful expropriation under Article 4 of the Treaty, the Tribunal need not – and must not – have recourse to other standards of investment protection.²⁷¹ However, as Claimant expressly raises only expropriation claims, the Tribunal considers that the potential relevance of the alleged violation of non-expropriation standards to its decision on the expropriation claim is an issue for the merits, rather than jurisdiction.

²⁶⁹ Claimant's Post-Hearing Brief, ¶ 15; Respondent's Post-Hearing Brief, ¶ 20.

²⁷⁰ Claimant's Post-Hearing Brief, ¶ 17.

²⁷¹ Cf. Respondent's Post-Hearing Brief, ¶ 22.

B. Standard of Protection Against Expropriation under the Treaty

259. Article 4 of the Treaty sets out the standard of protection against expropriation. It provides:

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

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

(b) the measures are not discriminatory;

(c) the measures are accompanied by provision for the payment of just compensation.

2. The amount of compensation must correspond to the market value of the expropriated investments at the moment of the expropriation.

3. The amount of this compensation may be estimated according to the laws and regulations of the country where the expropriation is made.

4. The compensation must be paid without undue delay upon completion of the legal expropriation procedure, but not later than three months upon completion of this procedure and shall be transferred in the currency in which the investment is made. In the event of delay beyond the three-months’ period, the Contracting Party concerned shall be liable to the payment of interest based on prevailing rates.

5. Investors of either Contracting Party who suffer losses of their investments in the territory of the other Contracting State due to war or other armed conflict or state of emergency in the territory of the other Contracting Party, shall be treated, with respect to the compensation for these losses, as investors of any third State.”

1. Summary of Claimant’s Position

260. Claimant submits that the use of the term “*deprivation*” in Article 4(1) of the Treaty is equivalent to the term “*expropriation*” in customary international law. According to Claimant, measures of deprivation constitute a “*taking*” of private property by the State

without the owner's consent and there is no requirement that the "taking" benefit the State concerned, or that it benefit any third party.²⁷²

261. Claimant argues that measures of deprivation can be direct or indirect. In relation to indirect expropriation, Claimant refers to the cases of *CME Czech Republic N.V. v. Czech Republic* in which the tribunal held that measures will constitute indirect expropriation when they "do not involve an overt taking but [...] effectively neutralize the benefit of the property of the foreign owner,"²⁷³ as well as *Metalclad Corporation v. The United Mexican States* in which the tribunal held that an indirect expropriation will occur when the measures have "the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property."²⁷⁴
262. Claimant submits that an indirect expropriation may manifest itself as a "creeping expropriation," whereby the investor's rights are devalued by virtue of a number of acts or omissions of a host State that cumulatively destroy the investment.²⁷⁵ Claimant refers to the case of *Biwater Gauff v. Tanzania* in which the tribunal affirmed that it should consider "the effect of individual, isolated, acts complained of, as well [...] the cumulative effect of a series of individual acts, in so far as such a cumulative effect might be to deprive the investor in whole or in material part of the use or economic benefit of its assets."²⁷⁶
263. Claimant also refers to Prof. Schrijver's opinion that "[p]articularly when the expropriation is alleged to have resulted from a broad series of acts, none of which [is] necessarily illegal under domestic law per se, the correct approach can only be to examine how each of those acts is 'properly' and 'fairly' to be characterized when viewed against the broader chronology of events, in the general pattern, of which it forms part."²⁷⁷ In reliance on Prof. Schrijver, Claimant asserts that Article 4(1) of the Treaty is "broad in scope."²⁷⁸

²⁷² Memorial, ¶¶ 489-490.

²⁷³ *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award (13 September 2001), **Exhibit CLA-9**, ¶ 604.

²⁷⁴ Memorial, ¶ 490; *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000), **Exhibit CLA-7**, ¶ 103.

²⁷⁵ Claimant's Post-Hearing Brief, ¶ 119; cf. Reply, ¶ 366.

²⁷⁶ Reply, ¶ 366; *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008), **Exhibit CLA-16**, ¶ 455.

²⁷⁷ Reply, ¶ 368; Claimant's Post-Hearing Brief, ¶ 120; Schrijver, ¶ 13.

²⁷⁸ Claimant's Post-Hearing Brief, ¶ 123; Schrijver, ¶ 53.

264. Claimant submits that the Tribunal must examine each of Respondent's acts in light of the circumstances surrounding, *inter alia*, the decision to invest and the process culminating in the termination of the Concession Contract. According to Claimant, "*the critical question for the Tribunal is whether the totality of the Respondent's actions in their cumulative effect constitutes an expropriation.*"²⁷⁹
265. Claimant is further of the view that the effect of Respondent's measures on the investor's legitimate expectations must also be taken into account.²⁸⁰
266. Claimant states that the scope of Article 4(1) of the Treaty extends to the protection of intangible rights, which include shares and equity interests, as well as contractual rights. In this regard, Claimant relies on the case of *RosInvest v. Russia* to support its argument that Vigotop may claim protection "*for the effect on its shares by measures of the host state*" taken against the Project Companies.²⁸¹
267. Finally, Claimant is of the view that the termination of a concession contract for invalid reasons constitutes a form of expropriation of a claimant's rights under such a contract, even when, as is the case here, it is the investor's subsidiary who is the party to the contract.²⁸²

2. Summary of Respondent's Position

268. Respondent submits that there is no dispute as to the general description of the requirements of a lawful expropriation under Article 4(1) of the Treaty. Respondent further does not contest Claimant's submission that an expropriation may be direct or indirect (including creeping) in nature.²⁸³
269. Respondent refers to the case of *Tecmed v. Mexico* in which the tribunal held that a direct expropriation involves "*a forcible taking by the Government of tangible or intangible property owned by the private person by means of administrative or legislative action to that effect.*"²⁸⁴ Respondent submits that, by contrast, an indirect expropriation results from "*the incremental encroachment on one or more of [the investor's]*

²⁷⁹ Claimant's Post-Hearing Brief, ¶¶ 118, 120.

²⁸⁰ Memorial, ¶ 491.

²⁸¹ Memorial, ¶ 492; *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Final Award (12 September 2010), **Exhibit CLA-10**, ¶ 608.

²⁸² Memorial, ¶ 492.

²⁸³ Counter-Memorial, ¶ 336.

²⁸⁴ Counter-Memorial, ¶ 337; *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (29 May 2003), **Exhibit CLA-6**, ¶ 113.

ownership rights [...] that eventually destroys (or nearly destroys) the value of his or her investment.”²⁸⁵

270. In relation to creeping expropriation, Respondent refers to the case of *Generation Ukraine v. Ukraine* in which the tribunal stated that creeping expropriation “*is a form of indirect expropriation with a distinctive temporal quality in the sense that it encapsulates the situation whereby a series of acts attributable to the State over a period of time culminate in the expropriatory taking of such property.*”²⁸⁶
271. Respondent submits that a finding of expropriation requires State interference of a certain magnitude or severity. It cites the case of *Pope & Talbot v. Canada*, in which the tribunal held that “*under international law, expropriation requires a ‘substantial deprivation’.*”²⁸⁷
272. According to Respondent, Claimant has conceded that Respondent’s conduct prior to the termination of the Concession Contract did not interfere with Claimant’s investment to such an extent as to constitute “*substantial deprivation*” and that the termination of the Concession Contract is therefore the “*crux*” of Claimant’s claim.²⁸⁸
273. Respondent considers that Claimant appears to advance two expropriation claims: (i) that the termination “*in and of itself [was] an expropriatory act,*” and (ii) that the termination was “*the last step*” in a series of measures that together constituted a creeping expropriation. Respondent refers to the case of *Enron v. Argentina* in which the tribunal held that “*if a given measure qualifies as a form of direct expropriation it cannot at the same time qualify as an indirect expropriation, as their nature and extent are different.*”²⁸⁹ In Respondent’s view, Claimant’s two claims are therefore necessarily alternative claims.²⁹⁰

3. The Tribunal’s Analysis

274. Article 4(1) of the Cyprus-Hungary BIT, which deals with protection against expropriation, may be quoted here again for ease of reference:

²⁸⁵ Counter-Memorial, ¶ 337; quoting the UNCTAD Series on Issues in International Investment Agreements II on Expropriation, 2012, p. 11. **Exhibit CLA-14**.

²⁸⁶ *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award (16 September 2003), **Exhibit RLA-13**, ¶ 20.22.

²⁸⁷ *Pope & Talbot Inc. v. Canada*, Ad hoc – IIC 192, Award (26 June 2000), **Exhibit RLA-7**, ¶ 102.

²⁸⁸ Counter-Memorial, ¶ 338.

²⁸⁹ Counter-Memorial, ¶ 339; *Enron Corporation Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award (22 May 2007), **Exhibit RLA-21**, ¶ 250.

²⁹⁰ Counter-Memorial, ¶ 339.

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

- (a) The measures are taken in the public interest and under due process of law;*
- (b) the measures are not discriminatory;*
- (c) the measures are accompanied by provision for the payment of just compensation.”*

275. The criteria for the legality of expropriation set out in Article 4(1) of the Treaty are largely consistent with customary international law. The Tribunal notes however that, in the present case, the Parties are primarily in dispute as to whether an expropriation occurred as a matter of fact. As Article 4 does not define when an expropriation has taken place as a matter of fact, this must be determined in light of the evidence.

276. There is no dispute between the Parties as to the legal concept of deprivation or expropriation, including that expropriation may take place indirectly. The Tribunal agrees with Claimant’s legal expert Prof. Schrijver that the language used in Article 4(1) of the Treaty is “*broad in scope.*”²⁹¹ Indeed, Article 4(1) of the Treaty expressly provides for a protection standard covering measures that “*directly or indirectly*” deprive investors of their investments. Furthermore, it is common ground between the Parties that indirect expropriation may take place in a “*creeping*” manner.

277. The Tribunal notes that Claimant advances claims for both direct and indirect expropriation. In its Reply, Claimant distinguishes between its claims (i) that Respondent directly expropriated Claimant’s investment by terminating the Concession Contract, and (ii) that in any event, the cumulative effect of Respondent’s culpable acts and omissions culminating in the termination was an indirect and creeping expropriation.²⁹² In its Post-Hearing Brief, Claimant focuses on its claim for indirect expropriation, which is based on the “*totality of Respondent’s actions in their cumulative effect,*” without further elaborating on its claim for direct expropriation.²⁹³

²⁹¹ Schrijver, ¶ 53.

²⁹² Section IV. E and F of the Reply.

²⁹³ Claimant’s Post-Hearing Brief, ¶ 120. In fact, the term “*direct expropriation*” is used only once throughout the whole document, namely, where Claimant notes that “*Respondent makes the deceptive submission that the concept of expropriation is somehow limited and extends only to the simplest form of direct expropriation.*” Claimant’s Post-Hearing Brief, ¶ 122 (emphasis added).

278. In the Tribunal's view, Claimant has not established that Respondent's actions and omissions prior to the termination of the Concession Contract, in and of themselves, had an expropriatory effect on Claimant's investment. This includes the revocation of Special Project Status for the Sukoró Site because the Tribunal is not convinced that this revocation would have prevented Claimant from realizing the Project, be it at Sukoró or at any of the 132 alternative sites contemplated under the Concession Contract, as will be discussed in more detail below. In any event, Claimant has not claimed that the revocation of Special Project Status in itself amounts to an expropriation. Consequently, the Tribunal is of the view that Respondent's pre-termination actions and omissions do not amount to an indirect or creeping expropriation, as alleged by Claimant.
279. By contrast, there is no doubt that the termination of the Concession Contract resulted in a substantial devaluation of Claimant's shareholdings in KC Bidding by depriving KC Bidding of its main asset, *i.e.*, its rights under the Concession Contract. It is further undisputed between the Parties that Article 4 of the Treaty protects Claimant against measures directed not only at Claimant's shareholdings in their own right, but also at Claimant's indirect interest in KC Bidding's rights under the Concession Contract. A substantial devaluation of Claimant's shareholdings could thus constitute a taking of Claimant's investment within the meaning of Article 4 of the Treaty.
280. Consequently, the Tribunal will focus on the question whether, as a matter of fact, the termination of the Concession Contract constituted an expropriatory act within the meaning of Article 4 of the Cyprus-Hungary BIT. In order to establish that the termination of the Concession Contract was of an expropriatory nature, Claimant must show in particular that the termination was a sovereign act rather than the act of an ordinary contracting party. In view of the fact that Claimant describes the termination of the Concession Contract as the "*culminating*" point of Respondent's various, allegedly unlawful, pre-termination actions and omissions, the Tribunal's analysis will also take into account Respondent's pre-termination conduct.

C. Relevance of Other Standards of Protection in the Cyprus-Hungary BIT

281. Before turning to its analysis, the Tribunal will first address the disputed issue whether other standards of protection in the Cyprus-Hungary BIT, in particular the fair and equitable treatment standard (the "**FET standard**") contained in Article 3, may be relevant to the finding of an expropriation.

1. Summary of Claimant's Position

282. Claimant submits that the non-expropriation standards of protection under the Treaty are relevant to the Tribunal's interpretation of the scope of Respondent's obligations under Article 4 of the Treaty and, in particular, to the assessment whether Respondent neutralized Claimant's investment by way of expropriatory conduct. In Claimant's view, Respondent's conduct constitutes multiple violations of such standards and is of central relevance for distinguishing an expropriation from *bona fide* regulation.²⁹⁴
283. Claimant argues that non-expropriation standards of protection under the Treaty are relevant not only to the assessment of the legality of an expropriation, but also to the assessment whether an expropriation has taken place.²⁹⁵ Claimant submits that the decisions in *Telenor v. Hungary*²⁹⁶ and *Nations Energy Inc. v. Panama*,²⁹⁷ relied upon by Respondent in support of its argument that other Treaty standards are not relevant, are inapplicable to the facts of this case. Vigotop states that the claimants in both of those cases raised two separate claims, one for expropriation and one for breach of the FET standard, and the tribunals refused to examine the self-standing claims for breach of FET as they fell outside their jurisdiction.²⁹⁸ In this case however, Claimant does not raise a separate claim for relief for breach of the FET standard.²⁹⁹
284. Claimant relies on *ADC v. Hungary*, in which the claimants similarly limited their claim for relief to the allegation that Hungary had expropriated their investments. The tribunal ruled that there was an expropriation and expressly referred to Hungary's breach of other investment protection standards contained in the Treaty.³⁰⁰
285. Claimant also refers to the case of *RosInvest v. Russia*, in which the tribunal, despite its jurisdiction being limited to expropriation, observed that it was doubtful whether Russia's actions could be seen as affording fair and equitable treatment.³⁰¹

²⁹⁴ Claimant's Post-Hearing Brief, ¶¶ 17-19; cf. Reply, ¶ 371.

²⁹⁵ Reply, ¶ 371.

²⁹⁶ *Telenor Mobile Communications AS v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award (13 September 2006), **Exhibit RLA-20**

²⁹⁷ *Nations Energy Inc. and others v. Republic of Panama*, ICSID Case No. ARB/06/19, Award (24 November 2010), **Exhibit RLA-30**.

²⁹⁸ Reply, ¶ 372.

²⁹⁹ See ¶ 259 above.

³⁰⁰ Reply, ¶ 374; *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award (2 October 2006), **Exhibit CLA-5**, ¶¶ 445, 379.

³⁰¹ Reply, ¶ 377; *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Final Award (12 September 2010), **Exhibit CLA-10**, ¶ 557.

286. Claimant further relies on Prof. Schrijver's legal opinion, in which he states:

*“[I]t cannot be denied that the same conduct will often be capable of giving rise to breaches of different standards of protection. The potential for overlap exists in particular between the fair and equitable treatment standard and the protection against indirect expropriations.”*³⁰²

287. Claimant asserts that Respondent does not challenge Claimant's submission that many of the elements relevant to the finding of a breach of the FET standard can materially inform the inquiry into whether there was an indirect expropriation. For example, Respondent does not contest the relevance of investors' legitimate expectations to both the expropriation and the FET standard.³⁰³

288. Claimant acknowledges that each of the Treaty standards protects against a different kind of interference by a State. Nevertheless, Claimant is of the view that even the authorities relied upon by Respondent do not undermine the argument that the same conduct will often be capable of giving rise to breaches of different standards of protection.³⁰⁴

289. In response to Respondent's reliance on the case of *FFIC v. Mexico*, in which the tribunal found that a clear case of discriminatory treatment did not give rise to an expropriation claim, Claimant contends that the tribunal's reasoning in that case would suggest the existence of a sliding scale, such that severely discriminatory treatment will rise to the level of an expropriation. Claimant alleges that the tribunal's recognition in that case that discriminatory treatment is used “*as one of the factors to distinguish between a compensable expropriation and a non-compensable regulation by a host State*”³⁰⁵ confirms the relevance of the standard to the existence of an expropriatory act and thereby confirms Claimant's submission that the FET standard is relevant to the present case.³⁰⁶

290. Claimant also refers to the case of *Quasar de Valores v. Russia*, in which the tribunal's jurisdiction was limited to the question whether the respondent had expropriated the claimant's investment without compensation and whether that expropriation was law-

³⁰² Reply, ¶ 375; Schrijver, ¶ 32.

³⁰³ Reply, ¶ 378.

³⁰⁴ Reply, ¶ 379; Claimant refers to Prof. Brigitte Stern, “*The Impact of Investment Treaty Arbitration: Comments on Present Expectations and Realities*” in ICCA Congress Series No. 14, 2008, p. 86. **Exhibit RLA-45**.

³⁰⁵ *Fireman's Fund Insurance Co. v. United Mexican States*, ICSID Case No. ARB(AF)/02/1, Award (17 July 2006), **Exhibit RLA-19**, ¶ 206.

³⁰⁶ Reply, ¶ 380.

ful. In that case, the tribunal noted that, while the unlawfulness of an expropriation is not the same thing as the existence of an expropriation, there is a strong overlap between the elements relevant to both analyses.³⁰⁷

291. Claimant refers to Prof. Schrijver's statement:

*“The practice of using the fair and equitable treatment standard as a yardstick to considering whether host State conduct transcended the threshold of an indirect expropriation has been adopted by investment tribunals, whose jurisdiction was otherwise confined to claims concerning expropriation.”*³⁰⁸

292. Claimant also relies on the case of *Biwater Gauff v. Tanzania*, in which the tribunal found that the withdrawal of a tax exemption “is best dealt with as a violation of the fair and equitable treatment standard and as one of the events which converted the contract termination process into an expropriation.”³⁰⁹

293. Claimant concludes that if conduct constituting a violation of the FET standard can “convert” a lawful act into an expropriatory one, it must be relevant for the present Tribunal to consider Respondent's actions in light of the FET and other Treaty standards.³¹⁰

2. Summary of Respondent's Position

294. Respondent submits that, in assessing Claimant's expropriation claims under Article 4 of the Treaty, the Tribunal need not consider – or decide – Claimant's claims concerning alleged violations of Article 3 of the Treaty, on the basis that Articles 3 and 4 provide for separate and independent Treaty standards and should be treated as such.³¹¹

295. Respondent refers to the case of *FFIC v. Mexico*, in which the jurisdiction of the tribunal was limited to claims concerning expropriation and compensation. In that case, the tribunal rejected the argument that it is significant in expropriation cases whether the government's acts and omissions are unfair and inequitable, and held that the claimant's argument “would conflate an [expropriation] claim with a [FET] claim, which is

³⁰⁷ Reply, ¶ 382; *Quasar de Valores SICA V S.A. and Others v. The Russian Federation*, SCC Case No. 24/2007, Award (20 July 2012), **Exhibit CLA-11**, ¶ 45.

³⁰⁸ Reply, ¶ 384; Schrijver, ¶ 35.

³⁰⁹ Reply, ¶ 385; *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008), **Exhibit CLA-16**, ¶ 708.

³¹⁰ Reply, ¶ 386.

³¹¹ Counter-Memorial, ¶ 317.

clearly inconsistent with the exclusion of [FET] claims from investor-State arbitration."³¹²

296. Respondent emphasizes that it does not suggest that considerations of due process and non-discrimination are not at all relevant in the context of Article 4 of the Treaty, but rather that such considerations concern the legality of an expropriation and do not relate to the existence of an expropriatory measure.³¹³ Respondent claims that only once the existence of an expropriation has been established can the question of its legality under the terms of the Treaty, including considerations of due process and non-discrimination, arise.³¹⁴
297. As regards the case of *FFIC v. Mexico*, Respondent also highlights the tribunal's reasoning that "*one cannot start an inquiry into whether expropriation has occurred by examining whether the conditions [...] for avoiding liability in the event of an expropriation have been fulfilled.*"³¹⁵
298. Respondent further refers to the case of *Corn Products International, Inc. v. Mexico* in which the tribunal held:

*"It is not the case that, because a measure which affects property rights is discriminatory, it is therefore an expropriation [...] Rather, if a measure is established to be an expropriation [...], it cannot then be justified if it is discriminatory."*³¹⁶

299. In response to Claimant's reference to the case of *ADC v. Hungary*, Respondent asserts that Claimant confuses the distinction between the existence of expropriatory measures and their legality. Respondent submits that the claimants in that case asserted breaches of Article 3 of the Treaty in the context of a violation of Article 4(1)(a) of the Treaty, which stipulates that due process is a condition for the legality of an expropriation. Respondent submits that the tribunal initially determined that there was an expropriation and even examined its legality without making any reference to Article 3 of the Treaty. It was not until its ultimate conclusion on the merits that the tribunal noted that the expropriation was unlawful because "*it did not comply with due process, in particular,*

³¹² Counter-Memorial, ¶ 319; Respondent's Post-Hearing Brief, ¶ 23; *Fireman's Fund Insurance Co. v. United Mexican States*, ICSID Case No. ARB(AF)/02/1, Award (17 July 2006), **Exhibit RLA-19**, ¶ 208.

³¹³ Counter-Memorial, ¶ 322 (emphasis in original); cf. Respondent's Post-Hearing Brief, ¶ 22.

³¹⁴ Counter-Memorial, ¶ 322.

³¹⁵ Counter-Memorial, ¶ 323; *Fireman's Fund Insurance Co. v. United Mexican States*, ICSID Case No. ARB(AF)/02/1, Award (17 July 2006), **Exhibit RLA-19**, ¶ 174.

³¹⁶ Counter-Memorial, ¶ 325; *Corn Products International Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/1, Decision on Liability (18 August 2009), **Exhibit RLA-25**, ¶ 90.

*the Claimants were denied of ‘fair and equitable treatment’ specified in Article 3(1) of the BIT and the Respondent failed to provide ‘full security and protection’ to the Claimants’ investments under Article 3(2) of the BIT.”*³¹⁷ In Respondent’s view, the tribunal in that case exceeded its jurisdiction in determining liability under Article 3 of the Treaty even if its determination ultimately related only to the illegality of the expropriation.³¹⁸

300. Respondent argues that the “*partial overlap between Articles 3 and 4 of the BIT*” does not justify reference to violations of protection standards contained in Article 3 in the context of expropriation claims under Article 4. Respondent submits that considerations of due process and non-discrimination in the context of an expropriation claim are part of the assessment whether an expropriation is lawful under Article 4(1)(a)-(c) and can be resolved without reference to Article 3.³¹⁹
301. Respondent disagrees with Claimant’s reliance on the case of *Biwater Gauff v. Tanzania* in its submission that “[v]iolations of other standards of investment protection [...] may contribute to a finding of unlawful expropriation.”³²⁰ Respondent argues that the award merely illustrates that one aspect of State conduct may give rise to several investment treaty violations; it does not support Claimant’s contention that one treaty violation may contribute to another treaty violation.³²¹
302. It is Respondent’s view that “*Claimant’s extensive reliance on non-expropriation Treaty standards betrays the absence of any expropriatory conduct in this case.*”³²² Respondent submits that Claimant “*attempts to salvage its ultra vires non-expropriation claims*” by emphasizing that it does not raise a separate claim for Hungary’s alleged failure to accord fair and equitable treatment. Respondent refers to the case of *Emmis International v. Hungary* in which the tribunal held that an investor cannot justify the submission of claims that exceed the State’s consent to arbitration simply by refraining from requesting separate relief.³²³ According to Respondent,

³¹⁷ Counter-Memorial, ¶¶ 327-328; *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award (2 October 2006), **Exhibit CLA-5**, ¶ 476.

³¹⁸ Counter-Memorial, ¶ 329.

³¹⁹ Counter-Memorial, ¶ 330.

³²⁰ Counter-Memorial, ¶ 331 referring to Memorial, ¶ 376.

³²¹ Counter-Memorial, ¶ 332.

³²² Respondent’s Post-Hearing Brief, ¶¶ 20-21.

³²³ Respondent’s Post-Hearing Brief, ¶ 24; *Emmis International Holding, B.V., Emmis Radio Operating, B.V., and MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, ICSID Case No. ARB/12/2, Decision on Respondent’s Objection Under ICSID Arbitration Rule 41(5) (11 March 2013), **Exhibit RLA-71**, ¶ 71.

Claimant's reliance on non-expropriation standards should therefore be rejected even if it is not accompanied by a separate request for relief.

3. The Tribunal's Analysis

303. The Tribunal recalls at the outset that, pursuant to Article 7(1) of the Treaty, its jurisdiction is limited to disputes "*concerning expropriation of an investment.*" While the Treaty provides for other standards of protection, in particular the FET standard, any dispute concerning such other standards does not fall within the scope of the Tribunal's jurisdiction.
304. As noted above, the Tribunal will first examine whether an expropriation has taken place as a matter of fact. If this is not the case, the Tribunal will not have to address the second question whether the expropriation was lawful.
305. In the Tribunal's view, the cases cited by the Parties, in which the tribunals' jurisdiction was limited to expropriation claims as is the case here, give no clear guidance as to whether non-expropriation standards may be applied in determining whether there was an expropriation. In particular, the case law suggests that non-expropriation standards have been considered primarily in determining the legality of an established expropriation, namely in the context of assessing compliance with the requirements of due process of law and non-discrimination, such as those articulated in Article 4(1)(a) and (b) of the Treaty.
306. In the case of *ADC v. Hungary*,³²⁴ which was relied upon by Claimant, the relevance of other treaty standards was discussed only in the context of due process, *i.e.*, in relation to the assessment whether the expropriation was lawful. Consequently, the tribunal's decision in that case gives no guidance as to whether non-expropriation treaty standards can be used to determine whether an expropriation has occurred.
307. Claimant further relies on the case of *RosInvest v. Russia*, in which the tribunal, despite its jurisdiction being limited to expropriation,³²⁵ concluded that "*there remain doubts*

³²⁴ *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award (2 October 2006), **Exhibit CLA-5**.

³²⁵ The arbitration clause in the UK-Soviet BIT originally limited the tribunal's jurisdiction in that case even further than in the present case, since it did not even extend to the question whether an expropriation had occurred, but rather limited the jurisdiction to the consequences of an expropriation, such as compensation. However, the tribunal held in its previous award on jurisdiction that the claimant could invoke the most-favored-nation clause contained in the UK-Soviet BIT to incorporate the broader arbitration clause contained in the Denmark-Russia BIT. As a consequence, the tribunal held that "*it has jurisdiction extending beyond that granted by Article 8 of the UK-Soviet BIT and covering the issues whether Respondent's actions have to be consid-*

whether [the distinctions made between the claimant and its competitors] *can be seen as a fair and equitable treatment.*”³²⁶ However, the tribunal did not give any precise reasons as to why it was appropriate to consider fair and equitable treatment in analyzing the expropriation claim, and ultimately concluded that it did not have to decide whether its doubts were justified.³²⁷ Consequently, this case also does not give clear guidance as to whether the FET standard as such may be relied upon in the finding of an expropriation.

308. Finally, the Tribunal notes that Respondent relies upon the case of *FFIC v. Mexico* in support of its argument that the Tribunal may not resort to other Treaty standards. In that case, the tribunal clearly stated that the claimant could not rely on the FET standard in support of its expropriation claim because this would “conflate” an FET claim with an expropriation claim, which in turn would not be consistent with the exclusion of FET claims from investor-State arbitration under Chapter Fourteen of the NAFTA.³²⁸ With regard to the relevance of discriminatory treatment on the other hand, the tribunal stated that such treatment not only was relevant to the question whether an expropriation was lawful, but also constituted one of the factors distinguishing expropriation from *bona fide* regulation by the host-State.³²⁹ The tribunal reached the conclusion that the respondent’s conduct was a clear case of discriminatory treatment of a foreign investor, but held that this conduct did not give rise to an expropriation claim because it did not involve a taking of the investment.³³⁰
309. The Tribunal is of the view that, while Claimant correctly points out that the tribunal in *FFIC v. Mexico* considered the respondent’s discriminatory treatment to be a relevant “factor” in its analysis whether there was an expropriation, it does not follow from the decision that the tribunal considered it possible to refer to other standards of protection. To the contrary, the tribunal clearly held that the claimant could not rely upon a breach of the FET standard as such to prove its expropriation claim. The Tribunal is

ered as expropriations and were valid.” *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Award on Jurisdiction (October 2007), ¶ 139.

³²⁶ *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Final Award (12 September 2010), **Exhibit CLA-10**, ¶ 557.

³²⁷ The tribunal held that it was not required to decide whether any particular measure would be sufficient, in itself, to amount to an expropriation because it found that the cumulative effect of the respondent’s conduct did amount to expropriation.

³²⁸ *Fireman’s Fund Insurance Co. v. United Mexican States*, ICSID Case No. ARB(AF)/02/1, Award (17 July 2006), **Exhibit RLA-19**, ¶ 208.

³²⁹ *Fireman’s Fund Insurance Co. v. United Mexican States*, ICSID Case No. ARB(AF)/02/1, Award (17 July 2006), **Exhibit RLA-19**, ¶¶ 176 (j), 206.

³³⁰ *Fireman’s Fund Insurance Co. v. United Mexican States*, ICSID Case No. ARB(AF)/02/1, Award (17 July 2006), **Exhibit RLA-19**, ¶¶ 203, 207.

therefore of the view that *FFIC v. Mexico* tends rather to support Respondent's position that other Treaty standards in general, and the FET standard in particular, may not be applied in determining whether there was an expropriation.

310. In the absence of clear precedents relevant to the present case, the Tribunal is of the view that it cannot decide whether an expropriation has occurred by determining whether other Treaty standards have been violated. In particular, the violation of the FET standard, for example, is neither a necessary nor sufficient basis for finding an expropriation. Thus, the Tribunal will not resort to other Treaty standards in determining whether an expropriation has occurred. This being said, the Tribunal notes that it is undisputed that the principle of good faith is a fundamental principle of international law,³³¹ consideration of which is not restricted to the context of FET claims. Even though, as Respondent correctly points out, the good faith principle is not in itself a source of obligations, it may inform the analysis whether Respondent's conduct amounted to an expropriation.
311. The Tribunal also notes that the same conduct may violate, or be relevant in determining violations of, different provisions of a BIT, as Claimant argues. But the mere fact that other standards may be violated by the same conduct does not necessarily mean that the conduct constitutes an expropriation. Whether the FET standard, for example, is violated and whether an expropriation has occurred require separate legal analyses, independently conducted, even though they may involve the same factual conduct.

D. The Tribunal's Approach to the Question of Expropriation

312. The Tribunal observes that the analysis whether certain conduct constitutes an expropriatory act cannot be carried out in an abstract manner, but rather must be based on the specific facts of the case. It has to be noted that the Concession Contract was not terminated by way of legislative act or executive decree, but rather by Respondent's exercise of negotiated contractual termination rights, on the grounds that Claimant allegedly failed to comply with its contractual obligations. In the Termination Letter, Respondent did not purport to invoke any of its sovereign prerogatives. On its face,

³³¹ Claimant's Post-Hearing Brief, ¶ 29; Respondent's Post-Hearing Brief, ¶ 27. Cf. Anthony D'Amato, "Good Faith" in *Encyclopedia of Public International Law*, 1992, p. 600: "*The principle of good faith is rooted in a natural law conception of customary international law. [...] The principle of good faith thus owes its present authoritative status to the natural law foundations of general international law, to customary international law as derived from the articulation of that custom in numerous treaties [...].*"

Respondent's termination notice would therefore appear to be the act of an ordinary contracting party rather than the act of a sovereign State.

313. In the Tribunal's view, the fact that Respondent purported to exercise a contractual right when terminating the Concession Contract does not exclude *per se* the possibility that this conduct at the same time amounted to an expropriation.³³² In the given circumstances, it is clear that the Tribunal must consider the way in which the Concession Contract was concluded, performed and terminated to determine the expropriation claim.³³³ At the same time, the Tribunal wishes to emphasize that, by taking such contractual matters into consideration, it will not determine contractual claims or exercise jurisdiction under the Concession Contract;³³⁴ any findings that this Tribunal may make in respect of the Concession Contract are relevant only as a part of the Tribunal's analysis of Claimant's expropriation claim.³³⁵
314. While the Parties do not dispute that the Tribunal in its expropriation analysis may take into account the circumstances in which the Concession Contract was entered into, performed and terminated, they do not agree on the subsequent question, which is whether there can be a finding of expropriation in the event that Respondent, as it alleges, in fact terminated the Concession Contract in accordance with its express terms and Hungarian law.

³³² The tribunal in *Bayindir v. Pakistan* similarly stated that "the fact that a State exercises a contract right or remedy does not in and of itself exclude the possibility of a treaty breach." *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award (27 August 2009), **Exhibit RLA-26**, ¶ 138. Cf. the findings of the *ad hoc* committee and the subsequently reconstituted tribunal in the case of *Vivendi v. Argentina. Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment (3 July 2002), **Exhibit CLA-106**, ¶ 110; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3 (formerly *Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic*), Award (20 August 2007), **Exhibit CLA-88**, ¶ 7.3.10. Cf. also the Decision on Jurisdiction in the case of *Impregilo v. Pakistan. Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction (22 April 2005), **Exhibit RLA-17**, ¶ 258.

³³³ The same approach was taken by the tribunal in *Bayindir v. Pakistan. Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award (27 August 2009), **Exhibit RLA-26**, ¶¶ 135-138.

³³⁴ As the tribunal in *Biwater Gauff v. Tanzania* stated; "A [...] distinction can be drawn between actually 'deciding' issues relating to the conclusion, performance and termination of a contract which is beyond the jurisdiction of the Arbitral Tribunal and 'taking into consideration' the facts surrounding the conclusion, performance and termination of this contract in order to decide the treaty claims submitted to the Arbitral Tribunal." *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008), **Exhibit CLA-16**, ¶ 472.

³³⁵ Cf. **Exhibit CLA-16**, ¶ 471.

315. Primarily, it is Claimant's case that Respondent's termination of the Concession Contract did not accord with its terms and was unlawful as a matter of Hungarian law.³³⁶ Claimant further contends, however, that, even assuming that the termination of the Concession Contract was in accordance both with its terms and with Hungarian law, this would not be dispositive of the Tribunal's analysis of whether the termination amounted to an expropriation.³³⁷ According to Claimant, the purported contractual termination grounds were only a pretext and, in fact, Respondent terminated the Concession Contract for public policy reasons, thus acting in its sovereign capacity, despite the formal appearance of the Termination Letter.³³⁸ Moreover, Claimant contends that the termination was a disproportionate response to the purported contractual breaches and a "*malicious exercise of a right, a fictitious exercise of a right and an abuse of rights.*"³³⁹
316. By contrast, Respondent submits that it terminated the Concession Contract in accordance with its terms and Hungarian law and asserts that a lawful termination cannot constitute an expropriation of contractual rights.³⁴⁰ Respondent is of the view that, even though the legality of the termination under Hungarian law is not dispositive of Claimant's expropriation claim, a State which is exercising its contractual right to terminate a contract in accordance with its terms and governing law, without invoking its sovereign powers, is "*by definition conducting itself as an 'ordinary contracting party'.*"³⁴¹ Respondent further contends that even a wrongful termination of a contract concluded by a State is not expropriatory in nature "*unless procured by sovereign conduct.*"³⁴²
317. The Tribunal notes that both Parties rely upon various precedents in support of their respective positions with regard to the question whether a contract termination, which was in accordance with its terms and its governing law, excludes the finding of an expropriation. The Tribunal has reviewed those decisions and notes that there is common ground insofar as all of the tribunals considered sovereign or governmental conduct on the part of the State to be a necessary requirement for a finding of an expropriation. In the words of the tribunal in *Impregilo v. Pakistan*, the State's alleged conduct

³³⁶ Reply, ¶ 423.

³³⁷ Reply, ¶ 441.

³³⁸ Cf. Claimant's Post-Hearing Brief, ¶¶ 144-150, 278.

³³⁹ Claimant's Post-Hearing Brief, ¶ 199.

³⁴⁰ Counter-Memorial, ¶ 358.

³⁴¹ Rejoinder, ¶ 273.

³⁴² Counter-Memorial, ¶ 408.

*“must be the result of behavior going beyond that which an ordinary contracting party could adopt. Only the State in the exercise of its sovereign authority (‘puissance publique’), and not as a contracting party, may breach the obligations assumed under the BIT.”*³⁴³

318. Claimant’s legal expert Prof. Schrijver referred to this common approach in investment treaty case law as the “*Stepping Out of the Contractual Shoes-Test*.”³⁴⁴

319. The Tribunal further notes that most³⁴⁵ of the tribunals considered the question whether the State’s termination of the relevant contract was in accordance with its terms and its governing law to be relevant for their analysis of the expropriation claim. In the case of *Malicorp v. Egypt*, the tribunal was of the view that, if the State

“had the right to discharge itself from the Contract pursuant to the private law rules governing it, [...] it is unnecessary to examine whether the [State] also took a measure under its public powers

³⁴³ *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction (22 April 2005), **Exhibit RLA-17**, ¶ 260. In the case of *Vannessa Ventures v. Venezuela*, the tribunal considered it “*necessary that the conduct of the State should go beyond that which an ordinary contracting party could adopt.*” *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/22, Award (16 January 2013), **Exhibit RLA-70**, ¶ 209. The tribunal in *Siemens v. Argentina* similarly stated that “*such behavior must be beyond that which an ordinary contracting party could adopt and involve State interference with the operation of the contract.*” *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award (6 February 2007), **Exhibit CLA-15**, ¶ 248. In the case of *Bayindir v. Pakistan*, the tribunal examined “*whether the alleged interference with the property or the rights of the investor has been made in the State’s exercise of its sovereign powers.*” *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award (27 August 2009), **Exhibit RLA-26**, ¶ 444. The tribunal in *Biwater Gauff v. Tanzania* noted that “*the critical distinction is between situations in which a State acts merely as a contractual partner, and cases in which it acts ‘iure imperi’, exercising elements of its governmental authority.*” *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008), **Exhibit CLA-16**, ¶ 458.

³⁴⁴ Schrijver, ¶ 23.

³⁴⁵ It appears that the case of *Parkerings-Compagniet v. Lithuania* is the only precedent in which the tribunal considered that, as there was no evidence that the State had used its sovereign power in terminating the relevant agreement, it was “*unnecessary and irrelevant to ascertain whether the termination breached the Agreement.*” *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award (11 September 2007), **Exhibit RLA-23**, ¶¶ 445-446. The tribunal in *Biwater Gauff v. Tanzania*, even though it also considered that it was not its role to decide contractual issues, such as whether the relevant contract was rightly or wrongfully terminated, stated at the same time that “*in determining the treaty claims [...], it is impossible to disregard the way in which the Lease Contract was concluded, performed, renegotiated and terminated.*” *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008), **Exhibit CLA-16**, ¶¶ 469-470. In the case of *Suez v. Argentina*, the tribunal similarly held that the question whether the alleged exercise of contractual rights was in accordance with the contract was a matter for the contractual dispute settlement process, but stated at the same time that, “*under certain circumstances, the unlawful exercise of a contractual remedy may support the conclusion that there has been a treaty breach*” and noted that it had taken into account the contractual conduct of the State and concluded that the measures taken to terminate the contract “*were ostensibly an exercise of its contractual rights but not measures of expropriation.*” *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability (30 July 2010), **Exhibit RLA-28**, ¶¶ 144-145.

(‘measures de puissance publique’), *not as a party to the Contract but as a State.*”³⁴⁶

320. With regard to the claimant’s allegation in that case that the contractual grounds were mere pretexts and that a change of government policy was the real reason for terminating the contract, the tribunal took this possibility into account and further stated:

*“A contracting party cannot be prohibited from discharging itself from a contract where it has legitimate reasons for doing so, even if, indirectly, the measure suits its convenience and enables it to go back on choices made earlier. Put another way, the first question to ask is whether the reasons given by the Respondent in its letter of termination justify the termination.”*³⁴⁷

321. The tribunal went on to find that that the principal contractual reason given by the State was “*sufficiently well founded*”; it further considered the criticisms of the claimant’s contractual performance raised in the letter of rescission to be “*sufficiently plausible*” and concluded that the contractual reasons on which the State had relied “*appear serious and adequate.*”³⁴⁸

322. The *ad hoc* annulment committee in *Vivendi v. Argentina* took the position that the legality of the State’s conduct under national law does not exclude the finding of an expropriation, but nevertheless considered it to be part of the expropriation analysis. The committee noted that “[a] *State may breach a treaty without breaching a contract, and vice versa.*”³⁴⁹ At the same time, the committee noted that “*municipal law will of-*

³⁴⁶ *Malicorp Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award (7 February 2011), **Exhibit RLA-31**, ¶ 126. The tribunal in *Impregilo v. Argentina* similarly stated that “*if the Contract is terminated in conformity with these provisions, this is not an act of expropriation by the State but an act performed by the public authorities in their capacity as a party to the Contract.*” *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award (21 June 2011), **Exhibit RLA-32**, ¶ 272.

³⁴⁷ **Exhibit RLA-31**, ¶ 129 (emphasis added).

³⁴⁸ **Exhibit RLA-31**, ¶¶ 137, 142, 143. By contrast, the tribunal in *Biwater Gauff v. Tanzania*, which found that the respondent had indeed exercised its sovereign authority, concluded that the respondent’s conduct was “*unreasonable and unjustified.*” *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008), **Exhibit CLA-16**, ¶ 502.

³⁴⁹ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment (3 July 2002), **Exhibit CLA-106**, ¶ 95. This finding was confirmed by the subsequently reconstituted tribunal: “*A state may breach a treaty without breaching a contract; it may also breach a treaty at the same time it breaches a contract.*” **Exhibit CLA-88**, ¶ 7.3.10. In the *ELSI* case, the chamber of the International Court of Justice similarly stated: “*What is a breach of treaty may be lawful in the municipal law and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision.*” *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, I.C.J. Reports 1989, 15, Judgment (20 July 1989), **Exhibit CLA-105**, ¶ 73. The tribunal in *Tecmed v. Mexico* also held: “*That the actions of the Respondent are legitimate or lawful or in compliance with the law from the standpoint of the Respondent’s domestic laws does not mean that they conform to the Agreement or to international law.*” *Técnicas*

*ten be relevant in assessing whether there has been a breach of the treaty” and argued in favor of “tak[ing] into account the terms of a contract in determining whether there has been a breach of a distinct standard of international law.”*³⁵⁰

323. In the case of *Vannessa Ventures v. Venezuela*, the tribunal did not expressly distinguish between the analysis of national and international law, but simply stated that the claimant had violated the contract, which rendered the termination “*both justified and legitimate*,” without giving an explanation as to the exact meaning of those terms.³⁵¹ The tribunal further observed that the contractual breaches concerned “*material factors*” in the initial selection of the claimant as the investor and held that the respondent’s actions had been “*legitimate contractual responses to what the Tribunal considers to be contractual breaches*.”³⁵²
324. The tribunal in *Bayindir v. Pakistan* first noted that “*a breach of contract is neither a necessary nor a sufficient condition for a breach of treaty*,” but later held that “*if the [termination] was lawful under the Contract, then there would be no taking of or interference with Bayindir’s rights*.”³⁵³
325. According to Claimant’s legal expert Prof. Schrijver, it is well established that “*the question whether a measure amounts to a violation of a State’s international obligation is one arising irrespective of the position under domestic law*.”³⁵⁴ Prof. Schrijver refers to Article 27 of the Vienna Convention on the Law of Treaties and Article 3 of

Medioambientales Tecmed, S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award (29 May 2003), **Exhibit CLA-6**, ¶ 120.

³⁵⁰ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment (3 July 2002), **Exhibit CLA-106**, ¶¶ 101, 105. The reconstituted tribunal later stated that it would “*consider [the] alleged contractual breaches*,” but also noted that it did “*not consider it necessary to come to a definitive view as to whether either party has or has not breached the Concession Agreement*.” **Exhibit CLA-88**, ¶¶ 7.3.10-7.3.11. In the *ELSI* case, the chamber also considered that, while it does not follow from a finding by a municipal court that an act was unjustified or arbitrary, that the act is also to be qualified as arbitrary in international law, such qualification by the court “*may be a valuable indication*.” *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, *I.C.J. Reports 1989*, 15, Judgment (20 July 1989), **Exhibit CLA-105**, ¶ 124.

³⁵¹ *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/22, Award (16 January 2013), **Exhibit RLA-70**, ¶ 200. The tribunal in *Swisslion v. Macedonia* also did not express an opinion as to the impact of legality under national law, as it only referred to an “*internationally lawful termination of a contract*.” *Swisslion DOO Skopje v. Macedonia*, ICSID Case No. ARB/09/16, Award (16 July 2012), **Exhibit RLA-38**, ¶ 314 (emphasis added).

³⁵² **Exhibit RLA-70**, ¶¶ 201, 210 (emphasis added).

³⁵³ *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award (27 August 2009), **Exhibit RLA-26**, ¶¶ 139, 458.

³⁵⁴ Schrijver, ¶ 10.

the Articles on Responsibility of States for Internationally Wrongful Acts, which provides:

“The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.”

326. At the same time, Prof. Schrijver argues that “*a breach of the contract has [...] evidentiary value for the purpose of establishing a breach of the treaty*” and “*may well be taken into account*” in the analysis of the expropriation claim.³⁵⁵
327. Having considered the relevant case law cited by the Parties and also taking into account Prof. Schrijver’s opinion, the Tribunal is of the view that the question whether Respondent’s termination of the Concession Contract was in accordance with both its terms and Hungarian law is not dispositive of the Tribunal’s analysis whether an expropriation occurred. The Tribunal rather agrees with the majority of the precedents and Prof. Schrijver that, even though a finding that the termination violated the terms of the Concession Contract or provisions of Hungarian law may be relevant to its expropriation analysis, such a finding is neither necessary nor sufficient to conclude that Article 4 of the Treaty was violated. In fact, the Tribunal notes that, even though some tribunals appear to have taken a different view on this issue, they nevertheless did not limit their analysis to purely contractual considerations. Rather, they included alleged non-contractual motives for terminating the contract in their discussion on whether it was “*legitimate*” or “*reasonable*” to terminate the contract in the respective circumstances.³⁵⁶
328. The Tribunal will therefore begin its analysis by focusing on the key question: whether – to put it in the words of Prof. Schrijver – Respondent “*stepped out of the contractual shoes*”³⁵⁷ and, in fact, acted in its sovereign capacity when it terminated the Concession Contract. Accordingly, the Tribunal will first examine whether, as alleged by Claimant, Respondent had “*a hidden political agenda,*” which was the true reason for its termination of the Concession Contract, meaning that Respondent in fact took this decision in order to give effect to a change in government policy, and thus in its sovereign capacity. If this were not the case, this would exclude the finding of an expropriation regardless of whether Respondent acted in accordance with the terms of the Con-

³⁵⁵ Schrijver, ¶ 20.

³⁵⁶ See references in paragraph 323 and note 348.

³⁵⁷ Schrijver, ¶ 23.

cession Contract and Hungarian law.³⁵⁸ However, even if the Tribunal were to conclude that Respondent indeed had public policy reasons to terminate the Concession Contract, this would not necessarily in itself lead to a finding that the termination amounted to an expropriation because Respondent could at the same time have had contractual grounds for terminating the Concession Contract.

329. In the latter case, the Tribunal would therefore have to continue its analysis by examining, as a second step, whether contractual grounds for terminating the Concession Contract in fact existed. In the Tribunal's view, a finding that none of the contractual grounds invoked by Respondent were sufficiently well-founded, while not being dispositive of the expropriation question in itself, could indicate that they were merely a pretext designed to conceal a purely expropriatory measure. If, on the other hand, the Tribunal were to reach the contrary conclusion, *i.e.*, that Respondent had contractual termination grounds in addition to its public policy reasons, this would require a further analysis.
330. In the event of such a parallel cause (public policy reasons and contractual grounds), the Tribunal would thus have to examine, as a third and final step, whether the contractual termination was legitimate, *i.e.*, consistent with the good faith principle. To be specific, the Tribunal would have to determine whether the termination constituted an abuse of the contractual right in order to avoid liability to compensate, that is, whether it involved a "*fictitious*" or "*malicious*" exercise of the right to terminate.
331. If the Tribunal were ultimately to conclude that it was indeed legitimate for Respondent to invoke its contractual grounds for terminating the Concession Contract, this would exclude a finding of an expropriation, despite the parallel existence of public policy reasons. The issues for determining an expropriation in the context of a contract termination are (i) whether the contract is terminated by the contractual procedure rather than a legislative act or executive decree, and (ii) whether there exists a legitimate contractual basis for termination, *i.e.*, (a) the contract or the governing law provides the ground for termination, (b) the evidence substantiates a factual basis for invoking the contractual ground, and (c) the State acts in good faith, not abusing its right by a fictitious or malicious exercise of it.

³⁵⁸ As stated by the tribunal in *Suez v. Argentina*, if the State did not act in the exercise of its sovereign powers, but as an ordinary contracting party, "*no expropriation has taken place and the Claimants have only contractual claims under the legal framework*" by which the contract is governed. *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability (30 July 2010), **Exhibit RLA-28**, ¶ 143.

E. Did Respondent Have Public Policy Reasons for Terminating the Concession Contract?

332. As noted above, the first question for the Tribunal to answer is whether it can conclude, on the basis of the evidence, that Respondent had public policy reasons for terminating the Concession Contract, and thus acted in its sovereign capacity.

1. Summary of Claimant's Position

333. Claimant submits that Respondent destroyed the Project through its sovereign conduct and that the present dispute therefore does not arise out of Respondent's ordinary good faith regulation or commercial conduct. In this respect, Claimant states that, following the signing of the Concession Contract and, in particular, following the election of the new Fidesz Government, it became typical for Respondent to communicate with Claimant via public statements and the media. Claimant refers to Dr. Budai's announcement of the revocation of Special Project Status at a press conference a day before the Government Decree of 23 September 2010 was issued as well as Dr. Budai's announcement of the termination of the Concession Contract at a press conference days prior to Respondent's formal notification to KC Bidding. Claimant submits that this is not the conduct of a good faith contractual counterparty.³⁵⁹

334. According to Claimant, Dr. Budai's pervasive role as an organ of the State, including his central role in the termination of the Concession Contract, "*embodies*" Respondent's expropriatory intent.³⁶⁰

335. Claimant further submits that the application of international law principles of attribution demonstrates that Respondent was acting in its sovereign capacity and exercising *puissance publique* when it terminated the Concession Contract.³⁶¹

336. Claimant asserts that both components of an internationally wrongful act, – (i) it must be attributable to the State and (ii) it must constitute a breach of an international obligation – are met in this case and that Respondent's State organs were, by definition, acting in a sovereign capacity.³⁶²

337. Claimant refers to the case of *Al-Kharafi v. Libya* in which the tribunal held:

³⁵⁹ Claimant's Post-Hearing Brief, ¶ 139.

³⁶⁰ Claimant's Post-Hearing Brief, ¶ 140.

³⁶¹ Claimant's Post-Hearing Brief, ¶ 144.

³⁶² Claimant's Post-Hearing Brief, ¶¶ 145, 148.

*“The contract signed between the Plaintiff and the Libyan party was preceded by a license from the Libyan Minister of Tourism, which gives the parties participating a clear governmental character that reinforces the Arbitral Tribunal’s conviction regarding the intervention of Libyan government bodies in the contract conclusion, performance and termination.”*³⁶³

338. In Claimant’s view, it is beyond serious argument that Respondent’s conduct was of a governmental character, which is demonstrated, *inter alia*, by

- the extensive and frequent interaction between the Project Sponsors and Respondent’s ministers, senior officials and officers throughout 2007-2009, culminating in the signature of the Concession Contract;
- the active encouragement and support of the Project at all relevant levels of the State;
- the award (and subsequent revocation) of Special Project Status and other State incentives; and
- the documented circumstances surrounding the termination of the Concession Contract.³⁶⁴

339. In this regard, Claimant asserts that the revocation of Special Project Status was “*deliberately intended as a pre-cursor to the Respondent’s termination of the Concession Contract and pursuit of financial penalties.*”³⁶⁵

340. Claimant relies on Dr. Budai’s statement in an interview on 27 October 2010:

*“The government cancelled the special status of the project, so if they wish to acquire any sort of permission or license they should do that via the established procedures, which is a far longer process. The conclusion is that they will not have any construction license or permission; therefore the state can cancel the concession agreement on the 1st of January 2011. In this case King City, represented by Joav Blum, will have to pay the state a penalty of 900 million HUF.”*³⁶⁶

³⁶³ Claimant’s Post-Hearing Brief, ¶ 149; *Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. Libya and others*, Final Arbitral Award (22 March 2013), **Exhibit CLA-128**, p. 250.

³⁶⁴ Claimant’s Post-Hearing Brief, ¶ 150.

³⁶⁵ Memorial, ¶ 264; *cf.* Claimant’s Post-Hearing Brief, ¶ 171.

³⁶⁶ **Exhibit C-231**.

341. Claimant further refers to two letters from Dr. Budai to Minister Matolcsy dated 5 October 2010³⁶⁷ and to Dr. Róza Nagy dated 6 January 2011,³⁶⁸ in which Dr. Budai “*pressed for the termination*” of the Concession Contract, specifically noting that the Ministry should give “*special consideration to the fact that the Special Project Status of the King’s City investment was revoked by the government.*”³⁶⁹
342. In Claimant’s view, the Government proposal for the revocation of Special Project Status³⁷⁰ was another reason why Dr. Budai in particular was “*acutely aware*” that the revocation would “*severely impede*” Claimant’s ability to comply with the contractual deadline.³⁷¹
343. Claimant submits that Dr. Kardkovács, Deputy State Secretary at the Ministry of National Economy, “*is another manifestation of the Fidesz government’s linkage between the revocation of Special Project Status and termination of the Concession Contract.*”³⁷² Claimant refers to a letter from Dr. Kardkovács to Mr. Langhammer dated 17 December 2010,³⁷³ in which he declared that the incentives package had “*expired*” (instead of being “*suspended,*” as the Government had previously phrased it), and to the Government proposal for the revocation of Special Project Status,³⁷⁴ prepared by Dr. Kardkovács.³⁷⁵ Claimant contends that Dr. Kardkovács’ “*pervasive role*” (alongside that of Dr. Budai) confirmed Respondent’s view that the revocation of Special Project Status, the withdrawal of incentives and the termination of the Concession Contract were “*closely linked.*”³⁷⁶
344. Claimant submits that the revocation of Special Project Status, besides being a clear signal that Respondent was no longer committed to the Project, made it “*more difficult (if not impossible) in practical terms*” to realize the Project.³⁷⁷ Claimant contends that Special Project Status was in fact cancelled to ensure that KC Bidding would be unable to fulfil the conditions of the Concession Contract by 1 January 2011, which would in turn give Respondent the right to cancel the Concession Contract.³⁷⁸

³⁶⁷ **Exhibit R-150.**

³⁶⁸ **Exhibit R-159.**

³⁶⁹ Claimant’s Post-Hearing Brief, ¶ 171.

³⁷⁰ **Exhibit R-94.**

³⁷¹ Claimant’s Post-Hearing Brief, ¶ 62.

³⁷² Claimant’s Post-Hearing Brief, note 113.

³⁷³ **Exhibit C-234.**

³⁷⁴ **Exhibit R-94.**

³⁷⁵ Claimant’s Post-Hearing Brief, note 113.

³⁷⁶ Claimant’s Post-Hearing Brief, ¶ 59.

³⁷⁷ Claimant’s Post-Hearing Brief, ¶ 172.

³⁷⁸ Memorial, ¶ 477.

345. Claimant concludes that the Fidesz Government had a political agenda behind terminating the Concession Contract, with the aim of destroying the Project.³⁷⁹ Claimant refers in particular to:

- the conflation of the Land Swap Agreement and the Concession Contract, which led to the stonewalling of the Project Sponsors and the Project;³⁸⁰
- the revocation of Special Project Status and the egregious manner in which this was conducted;³⁸¹
- the suspension and cancellation of incentives promised to the Project;³⁸²
- false changes in Government policy towards environmental protection and tourism in Hungary;³⁸³ and
- the commencement of multiple penalty lawsuits against Mr. Lauder.³⁸⁴

2. Summary of Respondent's Position

346. Respondent submits that Claimant has failed to establish that the termination of the Concession Contract was more than a legitimate contractual response to KC Bidding's contractual breaches.³⁸⁵ According to Respondent, Hungary terminated the Concession Contract in its capacity as an ordinary contracting party, without invoking any of its sovereign prerogatives.³⁸⁶

347. Respondent submits that, on 21 December 2010, KC Bidding certified to the Ministry of National Economy that SDI Europe had acquired lawful possession of, and the right to build on, the Sukoró Site.³⁸⁷ The Ministry, however, was advised by its external legal counsel that, in view of the pending Land Swap Litigation, SDI Europe could not have acquired such rights, and that the Ministry was accordingly entitled to terminate the Concession Contract with immediate effect pursuant to Clause 15.2.1.1. Respondent refers to Dr. Róza Nagy's witness statement, in which she stated: "[T]here was no

³⁷⁹ Claimant's Post-Hearing Brief, ¶¶ 151 *et seq.*

³⁸⁰ Claimant's Post-Hearing Brief, ¶¶ 153 *et seq.*; ¶¶ 166 *et seq.*

³⁸¹ Claimant's Post-Hearing Brief, ¶¶ 169 *et seq.*; ¶¶ 174 *et seq.*

³⁸² Claimant's Post-Hearing Brief, ¶ 181.

³⁸³ Claimant's Post-Hearing Brief, ¶¶ 182 *et seq.*

³⁸⁴ Claimant's Post-Hearing Brief, ¶¶ 192 *et seq.*

³⁸⁵ Rejoinder, ¶ 281; *cf.* Respondent's Post-Hearing Brief, ¶ 214.

³⁸⁶ Respondent's Post-Hearing Brief, ¶ 215.

³⁸⁷ **Exhibit C-203.**

*question that KC Bidding was in breach of the Concession Contract and that the Ministry was accordingly entitled to terminate the Concession Contract on that basis.”*³⁸⁸

348. Respondent further submits that, on 6 January 2011, the Ministry organized a working-level meeting to discuss the proposed termination of the Concession Contract. In a memorandum dated 7 January 2011, prepared for Minister Matolcsy, Dr. Kardkovács and Dr. Körösmezei explained that KC Bidding had failed to meet certain of its contractual obligations and that the Ministry was accordingly entitled to terminate the Concession Contract with immediate effect and claim frustration penalties.³⁸⁹ Respondent further submits that the Legal and Codification Department of the Ministry of National Economy thus recommended in this memorandum the termination of the Concession Contract on the basis of those breaches and the Concession Contract was accordingly terminated on 10 January 2011.³⁹⁰
349. Respondent emphasizes that the Termination Letter specifically refers to the grounds for termination invoked by the Ministry and describes KC Bidding’s various breaches of the Concession Contract, thus making it indistinguishable from a notice of termination that could have been sent by a private party.³⁹¹
350. Respondent concludes that the termination of the Concession Contract was carried out within the framework of the parties’ contractual relations, on the basis of purely contractual considerations relating to KC Bidding’s contractual breaches.³⁹²
351. With regard to Claimant’s assertion that Dr. Budai instigated and brought about Respondent’s termination of the Concession Contract, Respondent acknowledges that Dr. Budai had indeed written to the Ministry of National Economy on 5 October 2010 requesting that it “*consider the termination of the Concession Contract on 1 January 2011.*”³⁹³ Respondent submits, however, that Dr. Róza Nagy explained to Dr. Budai that as Claimant “*ha[d] until the end of 2010 to comply with the relevant clauses, [and] the termination of the concession contract, as of today, is untimely.*”³⁹⁴ Respondent contends that Dr. Budai’s attempts to interfere with the Concession Contract were thus “*authoritatively shot down*” by the Ministry of National Economy.³⁹⁵

³⁸⁸ Respondent’s Post-Hearing Brief, ¶ 215; Nagy, ¶ 41.

³⁸⁹ Rejoinder, ¶ 281; **Exhibit R-160**.

³⁹⁰ Respondent’s Post-Hearing Brief, ¶ 215.

³⁹¹ Respondent’s Post-Hearing Brief, ¶ 215; Rejoinder, ¶ 281; **Exhibit R-111**.

³⁹² Rejoinder, ¶ 282.

³⁹³ **Exhibit R-155**.

³⁹⁴ **Exhibit R-156**.

³⁹⁵ Respondent’s Post-Hearing Brief, ¶ 217.

352. Respondent rejects Claimant's suggestion that Dr. Budai expressed the view of the Government in his interview on 27 October 2010,³⁹⁶ in which he linked the revocation of Special Project Status to the termination of the Concession Contract. Respondent asserts that Claimant quoted only part of the document to support its allegation that Dr. Budai had proposed to Minister Fellegi to cancel the Concession Contract. Respondent submits that Minister Fellegi does not recall being approached by Dr. Budai to discuss the Concession Contract or the Sukoró transaction. In any event, Respondent refers to Minister Fellegi's first witness statement, in which he stated that "*Dr. Budai was not a member of the Cabinet and had no authority or influence over any decisions made by the government.*"³⁹⁷
353. Respondent further contends that both Dr. Budai and Claimant misunderstand the scope of the revocation of Special Project Status, which had been limited in its application to the implementation of the Project "*in the outskirts of Sukoró.*"³⁹⁸ Respondent submits that Special Project Status was Sukoró-specific and would not have been of any assistance in securing an alternative Project site by the 1 January 2011 deadline.³⁹⁹ In Respondent's view, Claimant does not dispute that fact.⁴⁰⁰ Respondent refers to Dr. Róza Nagy's testimony during the Hearing, in which she stated that Special Project Status "*would not have been revoked if the Sukoró site had remained available for the Project.*"⁴⁰¹
354. With regard to the Sukoró Site, Respondent refers to Article 2(2) of Government Decree 83/2009 (IV.10)⁴⁰² and the statement of its expert Prof. Király that Special Project Status could not have served to expedite the registration of Mr. Blum's interest in the Sukoró Site because the Government Decree came into force after the registration procedure had already been initiated. Respondent submits that the revocation was thus "*inconsequential*" to KC Bidding's obligations to secure a Project site within the deadline and did not contribute in any way to the termination grounds.⁴⁰³
355. Respondent notes that the Government proposal for the revocation of Special Project Status does not refer to the Concession Contract or the contractual deadline for secur-

³⁹⁶ **Exhibit C-231.**

³⁹⁷ Counter-Memorial, ¶ 403; Fellegi I, ¶ 16.

³⁹⁸ **Exhibit C-42.**

³⁹⁹ Counter-Memorial, ¶ 404; *cf.* Rejoinder, ¶ 152.

⁴⁰⁰ Rejoinder, ¶ 153.

⁴⁰¹ Respondent's Post-Hearing Brief, ¶ 174; Transcript, p. 1397, lines 5-7.

⁴⁰² Article 2(2) stipulates that "*the provisions of the present decree shall be applicable in the affairs commenced after its entry into force.*"

⁴⁰³ Counter-Memorial, ¶ 405; Király I, Section 9.

- ing a Project site.⁴⁰⁴ Respondent refers to Minister Fellegi's first witness statement, in which he stated that "[t]he termination of the Concession Contract was not raised in the proposal for the revocation of the special project status and was not discussed during the government session when the revocation was approved."⁴⁰⁵
356. Respondent states that Dr. Budai, who, as Respondent acknowledges, did indeed connect the revocation of the Special Project Status and the termination of the Concession Contract, was not involved in the process leading up to the revocation, as he did not participate in the preparation of the Government proposal or the 16 September 2010 meeting of the Administrative Secretaries in which the proposal was approved.⁴⁰⁶
357. In response to Claimant's allegation that Dr. Budai was a "vociferous critic of the Project and the Project Sponsors," Respondent submits that Dr. Budai was "indeed a 'vociferous critic', not of the Project, but of the Land Swap Agreement and of its direct consequence: the implementation of the Project in Sukoró." Respondent contends that Dr. Budai referred to the Sukoró Site in all of his press interventions relied upon by Claimant, which shows that his concerns related to the Land Swap Agreement and the implementation of the Project in Sukoró, as well as "other Sukoró-related ancillary matters such as the grant of the Sukoró-specific special project status and the Incentives Agreement."⁴⁰⁷
358. Respondent asserts that the excerpt from the 27 October 2010 interview⁴⁰⁸ confirms that Dr. Budai always referred to the Sukoró land swap and that it demonstrates that Dr. Budai did not know that Claimant intended to implement the Project elsewhere than in Sukoró. Furthermore, Respondent is of the view that the interview shows that Dr. Budai had no understanding of the reasons that led to the revocation of Special Project Status and that the Sukoró-specific status could not assist Claimant in its search for an alternative site. Respondent submits that this "demonstrates ad absurdum that Dr. Budai cannot have played the role which the Claimant now lends him."⁴⁰⁹
359. Respondent submits that Dr. Budai was only invited to participate in the 6 January 2011 meeting because KC Bidding had chosen to designate the Sukoró Site as the Project site and the Land Swap Agreement had therefore become very relevant in deter-

⁴⁰⁴ **Exhibit R-94.**

⁴⁰⁵ Respondent's Post-Hearing Brief, ¶ 170; Fellegi I, ¶ 13.

⁴⁰⁶ Respondent's Post-Hearing Brief, ¶ 171.

⁴⁰⁷ Rejoinder, ¶ 107.

⁴⁰⁸ **Exhibit C-231.**

⁴⁰⁹ Rejoinder, ¶ 107; cf. Respondent's Post-Hearing Brief, ¶ 172.

mining whether KC Bidding had complied with its obligation to lawfully acquire possession of, and the right to build on, the Project site.⁴¹⁰

360. Respondent emphasizes that neither the Termination Letter nor any of the Ministry's internal memoranda refer to the revocation of Special Project Status, which is, Respondent submits, "*for the simple reason that the special project status had no incidence on the purported transfer of possession and the right to build on the Sukoró site (or, for that matter, on the [sic] Vigotop's and KC Bidding's search for an alternative Project site.*"⁴¹¹ Respondent adds that Hungary never relied upon or otherwise referred to the revocation to justify or defend the termination of the Concession Contract.⁴¹²
361. Respondent concludes that there is no connection between the revocation of Special Project Status and the termination of the Concession Contract and reiterates that it terminated the Concession Contract for the simple reason that KC Bidding failed to secure a Project site by the contractual deadline of 1 January 2011.⁴¹³

3. The Tribunal's Analysis

362. As noted above, it is Claimant's case that the Fidesz Government had a "*hidden political agenda*" behind terminating the Concession Contract and thereby destroying the Project. According to Claimant, Respondent's revocation of Special Project Status was a key step in this agenda and was particularly egregious, given the manner in which it was carried out. Claimant further submits that the Fidesz Government's conflation of the Land Swap Agreement and the Concession Contract led to the stonewalling of the Project Sponsors and the Project and the withdrawal of its promises of financial and other support. Claimant further submits that Respondent's agenda to destroy the Project was underpinned by changes in Government policy in relation to environmental protection and tourism in Hungary. Claimant submits that Respondent's "*malicious intent*" was further evidenced by its commencement of multiple penalty lawsuits against Mr. Lauder. In Claimant's view, the Termination Letter was the final measure in a line of wrongful exercises of sovereign power that cumulatively deprived Claimant of its investment.⁴¹⁴ The Tribunal also notes that Mr. Langhammer testified he was offended

⁴¹⁰ Respondent's Post-Hearing Brief, ¶ 220.

⁴¹¹ Respondent's Post-Hearing Brief, ¶ 218.

⁴¹² Respondent's Post-Hearing Brief, ¶ 170.

⁴¹³ Respondent's Post-Hearing Brief, ¶¶ 219, 221.

⁴¹⁴ Cf. Claimant's Post-Hearing Brief, ¶¶ 151 *et seq.*

by this treatment and stated: “[I]n all my 40 years of experience, I’ve never been treated like this by any Government.”⁴¹⁵

363. The Tribunal recalls that its jurisdiction does not extend to determining a breach of the FET standard; it will therefore express no view as to the fairness of Respondent’s conduct, including the Government’s imposition on Claimant or its surety Mr. Lauder of “penalt[ies] for frustration”⁴¹⁶ of the Concession Contract despite the fact that the new Government had previously withdrawn its active support for the Project and had determined by at least the fall of 2010 that, “[a]ccording to the new plans of the government – based on environmental and touristic considerations – [the Project] shall not be implemented at Sukoró.”⁴¹⁷ Instead, the Tribunal must focus on the expropriation issue and determine, as a first step, whether there is sufficient evidence that Respondent had public policy reasons for terminating the Concession Contract, and thus whether it acted in its sovereign capacity.
364. In reviewing the evidence submitted by the Parties in these proceedings, the Tribunal has identified a number of pieces of evidence that it considers to be particularly pertinent to determining whether Respondent had public policy reasons for terminating the Concession Contract. The Tribunal will examine this evidence in chronological order below, grouping it into three different time periods: (i) the period prior to the signing of the Concession Contract on 9 October 2009; (ii) the period between the signing of the Concession Contract and the change of government, *i.e.*, the assumption of office by Dr. Orbán, leader of the Fidesz Party, as Prime Minister on 29 May 2010; and (iii) the period following the change of government. In addition, the Tribunal will examine Dr. Budai’s actions following his appointment as Prime Minister’s Commissioner in June 2010.
365. The Tribunal observes that to the extent certain statements were made by members of the Fidesz Party while it was in opposition, they cannot be attributed to Respondent. Nevertheless, the Tribunal considers such statements to be relevant in that they may inform the Tribunal’s conclusion as to the Government’s policy relating to casino projects in Hungary generally after the Fidesz Party took power on 29 May 2010.
366. As to Dr. Budai’s various statements, the Tribunal considers it necessary to distinguish between the time periods before and after his appointment as Prime Minister’s Com-

⁴¹⁵ Transcript, p. 975, lines 3-14.

⁴¹⁶ *Cf.* Clauses 12.5.1 and 12.5.5 of the Concession Contract (**Exhibit C-1**).

⁴¹⁷ **Exhibit R-94**.

missioner on 8 June 2010 and concludes that only the latter can be attributed to Respondent. Contrary to what Claimant alleges,⁴¹⁸ the mere fact that Dr. Budai was a member of the supervisory board of a State organization – before Prime Minister Orbán appointed him as his Commissioner – is not sufficient to render his conduct attributable to Respondent. However, contrary to Respondent’s contention,⁴¹⁹ Dr. Budai’s conduct following his appointment as Prime Minister’s Commissioner on 8 June 2010 can be attributed to Respondent. Prime Minister Orbán appointed Dr. Budai his Commissioner by way of a Government Decree⁴²⁰ and Dr. Budai reported directly to the Prime Minister. His position is also reflected in his official communications in which he used the letterhead “OFFICE OF THE PRIME MINISTER - DR. GYULA BUDAI” followed either by “Prime Minister’s Commissioner”⁴²¹ or by “government commissioner.”⁴²² In these circumstances, it is clear that the acts and statements of Dr. Budai in his capacity as the Prime Minister’s Commissioner are attributable to Respondent.

367. In reviewing the evidence, the Tribunal will also determine whether Respondent had public policy concerns relating to the Project as a whole, or whether any such concerns were directed only at the establishment of the Project at Sukoró.

a) The Period Prior to the Signing of the Concession Contract

368. The first statement in the record documenting the Fidesz Party’s opposition to the Project at Sukoró is dated 15 August 2009. On that day, Mr. István Balsai, Vice President of the General Assembly of Fejér County and a member of the Fidesz Party, gave a speech, in which he stated that they would “save the area of the Lake Velencei by preventing [the King’s City] project.”⁴²³

369. In a press conference also on 15 August 2009, Dr. Budai, then Association Director of MAGOSZ (National Association of Hungarian Farmers’ Societies and Cooperatives),

⁴¹⁸ Reply, ¶ 230.

⁴¹⁹ Counter-Memorial, ¶¶ 20, 403.

⁴²⁰ **Exhibit R-179.**

⁴²¹ **Exhibits C-383 and C-395.**

⁴²² **Exhibits R-150 and R-159.** Even though the English translation of **Exhibit R-150** (dated 5 October 2010) uses the word “government commissioner” instead of “Prime Minister’s Commissioner” and therefore suggests that Dr. Budai used this title prior to his appointment as Government Commissioner on 9 November 2010, the original Hungarian term “*miniszterelnöki megbízott*” is identical to the Hungarian term used in **Exhibits C-383 and C-395**. By contrast, the Hungarian term in **Exhibit R-159** (dated 6 January 2011) is “*elszámoltatási és korrupció-ellenes kormánybiztos*,” which confirms that Dr. Budai did not use the same title before and after his appointment as Government Commissioner in November 2010.

⁴²³ **Exhibit C-357.**

announced that the Fejér County Chief Prosecutor's Office had indicted Mr. Blum on charges of forging public documents on the basis that Mr. Blum "*was not habitually residing or accessible at the home address which he specified.*"⁴²⁴ Dr. Budai referred to Mr. Blum as an "*impostor*" and a "*fraudster*" and further stated that there had been a "*series of fraud[s]*" in relation to the Land Swap Agreement.⁴²⁵

370. In an interview on Echo TV on 17 August 2009, Dr. Budai stated that, as early as December 2008, he had voiced his suspicions of corruption in relation to the land swap transaction to Mr. Tátrai, then CEO of the MNV, as well as to the chairman of the Audit Committee of the Land Fund Management Agency. Dr. Budai reiterated that "*we are faced with serial fraud here*" and stated that, due to the forgery of public documents by Mr. Blum, "*the whole land swap can be considered legally invalid.*"⁴²⁶
371. On 27 August 2009, Dr. Budai participated in a further press conference, at which he stated that it was a "*fact that the King's City casino project in Sukoró [...] will not be implemented.*" In his view, "*the Sukoró project is a large-scale theft supported by the government.*" On this occasion, Dr. Budai also announced that, in the event of a change in government, "*every person [...] responsible for wasting several hundred million Forints of the taxpayers in such a way, will be called to account.*"⁴²⁷
372. On 28 August 2009, the Fidesz Party issued a press release, in which it cited Mr. Balsai's stating at a press conference: "*No casino will be built here [at Sukoró]*" because the "*processes around it are illegal.*" Mr. Balsai further stated:
- "[I]f so much as one single stone is turned in connection with this investment, the new government that would take office in a few months will 'undo it' without legal consequences or any compensation to the investors. [...] We wish to once again call upon the government, to cancel this project for good and forget about it."*⁴²⁸
373. During the same press conference, another Fidesz politician, Mr. András Cser-Palkovics, mentioned that there were, *inter alia*, "*environmental problems,*" which were part of "*the negative effects of this case on the sporting life of this area.*"⁴²⁹

⁴²⁴ Exhibit C-267.

⁴²⁵ Exhibits C-267 and C-122.

⁴²⁶ Exhibit C-268.

⁴²⁷ Exhibit C-339.

⁴²⁸ Exhibit C-98.

⁴²⁹ Exhibit C-98.

374. On 18 September 2009, Dr. Orbán, then leader of the opposition Fidesz Party, participated in an interview on HirTV and was asked about “*the Sukoró casino at Lake Velencei.*” In relation to the casino industry generally, Dr. Orbán commented that:

*“The situation is even worse than that. [...] I saw a whole map, a campaign plan describing about seven or eight large casino cities that they want to create in the country. [...] In Hungary’s economic policy strategy, the goal to transform Hungary into a ‘casino country’, a gambling country, so that our country would have the largest casino industry in Europe, this was not included in the government program. [...] This is a secret plan [...].”*⁴³⁰

375. With respect to Sukoró, Dr. Orbán referred to Mr. Balsai’s statement of 28 August 2009 and stated:

*“All I can say is what one of the parliamentary representatives of FIDESZ has said: not even a single shovel of earth is worth moving there. We will reinstate [...] I support the idea that, since we live in a democracy, that we should have a meaningful discussion how Hungary would want to fit in the global casino industry. Do we want to be Europe’s casino dumping ground. [...] Let us discuss it. Not only in Parliament, in general, and then let us make a decision in the matter. But this dispute has not taken place. No one has made a decision about this matter, and this plan would fundamentally transform the character of the Hungarian economy. In addition, this has several ramifications related to public security, money laundering and quite a few unclean issues. So for this reason, if I have the chance to participate in this dispute, so far, I have not had the chance to do this, I will stand for handling this gingerly [...] Hungary is not a casino country.”*⁴³¹

376. On 8 October 2009, *i.e.*, one day before the Concession Contract was signed, Dr. Budai met with Dr. Oszkó at the Ministry of Finance to discuss, among other things, the Land Swap Agreement.⁴³² At this meeting, Dr. Budai apparently urged the immediate termination of the Land Swap Agreement, as he considered it “*a void agreement.*”⁴³³

377. On the same occasion Dr. Oszkó, then Minister of Finance, stated to journalists invited by Dr. Budai:

⁴³⁰ Exhibit C-302.

⁴³¹ Exhibit C-302.

⁴³² Exhibits C-124 and C-125. ⁴³³ Exhibit C-124. ⁴³⁴ Exhibit C-124.

⁴³³ Exhibit C-124. ⁴³⁴ Exhibit C-124.

“[T]he concerns in connection with the casino investment in Sukoró are related to the plot exchange agreement and the value proportionality. [...] [the members of the Government] will try to reach primarily the cheapest solution, from the aspect of the state and [...] the termination has to be compared with all the other such possibilities by which they could possibly reach a similar result, however, by involving less risk for the State.”⁴³⁴

b) The Period between the Signing of the Concession Contract and the Change of Government

(i) Evidence Relating to Events Following the Signing of the Concession Contract

378. On 9 October 2009, two hours after the Concession Contract signing ceremony, the Ministry of Finance issued a press release – without consultation with the Project Sponsors, in which it stated that it would *“make sure, that the MNV immediately starts discussions with Joav Blum about the Sukoro land swap, with the aim of restoration of the original – pre-land-swap-condition”* and, in the event that the discussion was not concluded within 30 days, that it would *“give [an] order to [the] MNV to take the necessary legal steps to invalidate the land-swap contract.”* The press release also informed the public that the land swap investigations within the Ministry of Finance were ongoing and that the Concession Contract with KC Bidding had been signed. At the same time, however, the Ministry stated in its press release that *“the venue of [the] project should be the Mid-Transdanubian region,”* thus giving *“[t]he investment group [...] the opportunity to realize the casino project within the region in line with the law, thus the contract does not provide for the exact venue of the investment.”⁴³⁵*

379. On 20 October 2009, Dr. Budai referred the land swap investigation to the Chief Prosecutor’s Office, handing over documents that, in his view, showed that the Land Swap Agreement had been concluded *“disregarding the provisions of the property act.”⁴³⁶*

380. In a press conference on 18 November 2009, Dr. Budai requested that, in light of the Fejér County Court’s final judgment that the home address of Mr. Blum had been fictitious, Dr. Oszkó immediately direct the MNV to *“withdraw from the contract due to its invalidity.”* He further stated that, on the basis of this administrative judgment, *“the criminal court will establish the investor’s guilt of forgery of public documents”* and

⁴³⁴ Exhibit C-124.

⁴³⁵ Exhibit C-128.

⁴³⁶ Exhibit C-126.

referred to Mr. Blum as “*a common criminal.*”⁴³⁷ Mr. Blum was ultimately acquitted of maintaining a fictitious home address, and thus of forging public documents.⁴³⁸

(ii) Evidence Relating to the Alternative Site in Székesfehérvár

381. On 3 December 2009, the local government of Székesfehérvár decided to withdraw its consent to the Project being implemented at its settlement, such consent having initially been given prior to the Tender.⁴³⁹ On 17 December 2009, Dr. Ibolya Balogh, Chair of the Fejér County General Assembly and a member of the Fidesz Party, submitted a proposal to the General Assembly containing an appeal to the 28 local governments of Fejér County that had similarly given their consent to the Project prior to the Tender. She requested “*vigorously*” that the governments:

*“not support directly or indirectly the implementation of the ‘Category I’ casino investment called King’s City questioning the belief in the constitutional state, associated with governmental decisions against the Constitution supervised by two Prime Ministers, protestations from the Public Prosecutor Departments, court cases that can be associated with the investment – seriously involving the criminal responsibility – against persons belonging to business and governmental circles that are in contact or can be associated with the investor company, and withdraw their previous theoretical agreement – considering the public law obstacles, initiated court cases and prosecutors’ protestations meanwhile arisen.”*⁴⁴⁰

382. On 15 January 2010, the newspaper *Magyar Hírlap* published a news article with the title “*King’s City: Will it be established in Székesfehérvár instead of Sukoró?*” according to which the Concession Company had now been established at Székesfehérvár. The article also informed the public that Clause 7.1.2 of the Concession Contract provided that the Concession Company was required to be established within the administrative area of the locality where the concession activity would be exercised. According to the article, Mr. András Cser-Palkovics, assistant spokesman for the Fidesz Party,

⁴³⁷ **Exhibit C-270.**

⁴³⁸ On 14 September 2011, Mr. Blum was acquitted at first instance by the Székesfehérvár Municipal Court. Joint Chronology, item 319; **Exhibit C-172.** On 11 September 2012, Mr. Blum was acquitted at second instance by the court at Székesfehérvár. Joint Chronology, item 344. Following a request for judicial review filed by the Prosecutor, Mr. Blum was ultimately acquitted by the *Curia* on 13 September 2013. Joint Chronology, item 358. Ms. Blum’s testimony during the Hearing in this regard was also not challenged during cross-examination. Transcript, p. 633 lines 9-15, p. 634 lines 6 -10.

⁴³⁹ **Exhibit C-280.**

⁴⁴⁰ **Exhibit C-328.**

had commented to the newspaper that “*his party had opposed this investment project from the first moment.*”⁴⁴¹

383. Following a letter of complaint from Mr. Gaye to Dr. Oszkó of 26 February 2010 regarding the withdrawal of consent by the Székesfehérvár Council,⁴⁴² Dr. Oszkó wrote on 8 March 2010 to Dr. Viktor Bóka, the Székesfehérvár Council’s notary, and enclosed a copy of this letter in his response to Mr. Benkley of the same date.⁴⁴³ In the letter to Dr. Bóka, Dr. Oszkó stated that there was no legal provision that would allow for the withdrawal of the Council’s consent to the establishment of the Project at its settlement. Dr. Oszkó instructed Dr. Bóka as follows:

*“Since the decision of the withdrawal cannot be considered as a statement capable of exerting a direct effect on the concession agreement, the settlements listed in Annex 1 to the concession contract, including Székesfehérvár, continue to be available as possible premises for the exercise of the activity subject to the concession.”*⁴⁴⁴

384. On 6 April 2010, *i.e.*, five days before the national elections took place, the Fidesz Party issued a press release concerning the potential location of the Project at Székesfehérvár:

“Székesfehérvár is the City of Kings and not that of King’s City.

*Fidesz is protesting because the Minister of Finance did not accept the decision of Székesfehérvár’s local government by which it withdrew its support to the casino concession agreement [...] Following the initiative of Fidesz, the local government of Székesfehérvár decided to withdraw its permit.”*⁴⁴⁵

385. In this regard, the Tribunal notes that Dr. Róza Nagy, State Secretary at the Ministry of National Economy, testified at the Hearing in response to a question from the Tribunal whether casino projects were being disfavored by the Fidesz Government as a form of a touristic project for the country:

“With regard to the future, yes, they were disfavored by the Government. Nevertheless, the Government respected the validity of contracts that had been concluded before but we stated that we would not assign [sic] similar contracts in the future. However, contracts

⁴⁴¹ Exhibit C-261.

⁴⁴² Exhibit C-144.

⁴⁴³ Exhibit C-145 enclosing Exhibit R-83.

⁴⁴⁴ Exhibit R-83.

⁴⁴⁵ Exhibit C-327.

that had been signed by the previous Government were fully respected, were regarded as fully valid by the Government."⁴⁴⁶

386. The Tribunal further notes that, in his letter to Mr. Langhammer dated 17 December 2010, *i.e.*, in the critical phase preceding the expiration of the contractual deadline on 1 January 2011 and in response to Mr. Langhammer's letter to Prime Minister Orbán dated 24 November 2010,⁴⁴⁷ Dr. Kardkovács, Deputy State Secretary at the Ministry of National Economy, also stated in clear terms:

*"The Government of the Hungarian Republic is going to proceed pursuant to the referring and effective legal stipulations and the provisions of the [Concession] agreement."*⁴⁴⁸

(iii) Evidence Relating to the Political Campaign Against Former Prime Minister Gyurcsány

387. In his witness statement, Mr. Lauder stated that, on 20 February 2010, he met with Dr. Orbán, then leader of the opposition party, because, *"by this time, [...] it was clear that Dr. Orbán would become the next Prime Minister of Hungary."*⁴⁴⁹ Mr. Lauder had requested this meeting *"following the publication of a series of hostile articles in the Hungarian media in the run-up to the national elections that engaged in anti-Semitic and other criticism of the Project and the Project Sponsors."* He stated:

*"It was evident that Fidesz was behind these media attacks, since they were using the Project to undermine the Socialist opposition and, in particular, former Prime Minister Gyurcsány."*⁴⁵⁰

388. In this regard, former Prime Minister Gyurcsány stated in his witness statement:

"[T]he early, relatively low-level, civic position to the King's city project was soon seized upon by the Fidesz opposition party and its leadership for political purposes. The Fidesz party, as part of its political agenda, playing nationalist chords, launched a series of attacks against all forms of foreign investment in Hungary. The King's city project was not the only target of this campaign, but it soon became a focal point of it. This is because Fidesz and its leader, Dr. Viktor Orbán (who was my main political rival at the time, especially following my victory over him in the 2006 national election in Hun-

⁴⁴⁶ Transcript, p. 1460, lines 6-17.

⁴⁴⁷ **Exhibit C-154.** See ¶ 188 above.

⁴⁴⁸ **Exhibit C-234.** See ¶ 191 above.

⁴⁴⁹ Lauder I, ¶ 13.

⁴⁵⁰ Lauder I, ¶ 14.

gary) identified my encounter with the King's city project backers at the meeting of 21 May 2008 as a good opportunity to attack me politically."⁴⁵¹

389. According to Mr. Lauder's recollection of his 20 February 2010 meeting with Dr. Orbán, he expressed to Dr. Orbán that, in his view, "*the criticism being levelled at the Project was entirely unfair*" and that he did not believe that "*the Prime Minister in-waiting of Hungary would ultimately consider it sensible to pass up the great opportunity to bring this Project to the country.*"⁴⁵² Dr. Orbán apparently only responded that he would "*look into*" Mr. Lauder's concerns and added "*that 'certain people' were opposed to the land swap and did not want the Project to succeed.*" In Mr. Lauder's view, it was clear from this reaction that Dr. Orbán "*had no desire to lend support to the Project.*"⁴⁵³
390. However, Mr. Lauder stated in his oral testimony that he still believed after his meeting with Dr. Orbán on 20 February 2010 that, "*after the election [Dr. Orbán] would, in fact, change his mind and allow [the Project] to go ahead.*"⁴⁵⁴
391. In a press release of 26 March 2010, the Fidesz Party announced that it would initiate investigations into several projects in which it suspected corruption. This "*10+1*" list included "*Sukoró.*"⁴⁵⁵ The "*accountability list*" expressly referred to the casino investment in Sukoró and attacked in particular the approval of Special Project Status by the previous Government.⁴⁵⁶
392. After the Fidesz Party won the national elections on 11 April 2010, Mr. Balsai, acting in his capacity as legal manager of Fidesz's president staff, gave a press conference on 20 April 2010 entitled "*Gyurcsány and the Sukoro theft.*" Mr. Balsai stated that the Fidesz Party would begin investigations into the cases in respect of which it suspected corruption, including the "*Sukoro land speculation and land exchange.*" He stated:

"[W]e will investigate in details [sic] the Sukoro land exchange and real estate swindle; the scandalous theft of public assets which would have happened in Sukoro if the case hadn't been stopped, partly as a

⁴⁵¹ Gyurcsány, ¶ 19.

⁴⁵² Lauder I, ¶ 15.

⁴⁵³ Lauder I, ¶ 16.

⁴⁵⁴ Transcript, p. 1755, lines 5-6, p. 1756, lines 21-22.

⁴⁵⁵ Exhibit C-157.

⁴⁵⁶ Exhibit C-158.

result of our intervention, partly owing to the actions of the prosecutors.”⁴⁵⁷

393. Former Prime Minister Gyurcsány stated in this context:

“It became clear to me at that point [following the 20 April 2010 press conference] that the Fidesz leadership had identified the King’s city project as a means to persecute me and end my political career in Hungary.”⁴⁵⁸

394. According to Mr. Langhammer’s recollection:

“[T]he Fidesz party has been trying to assert that corruption took place between the Project Sponsors and the former Socialist Government, principally in order to discredit the former Prime Minister, Mr. Ferenc Gyurcsány.”⁴⁵⁹

395. On 10 May 2010, Dr. Balogh, the Fidesz-connected Chair of the Fejér County General Assembly, participated in a discussion with the newspaper *Magyar Hirlap*. She referred to the “casino project of Sukoró” as “a crime, not only against Velence and Fejér County, but the whole Hungarian nation.” In her view, “the casino city would have annexed the whole northern beach of the lake” and would have “potential tragic environmental impacts on the lake itself and the flora and fauna of the neighbourhood.” Dr. Balogh referred to the Project as “an entertainment monster” and to the workplaces to be created as “modern-age degrading slavery” and stated: “[I]et’s keep rather the natural character of the lake.”⁴⁶⁰

c) The Period Following the Change of Government

396. On 8 June 2010, following his assumption of office as Prime Minister of Hungary on 29 May 2010, Dr. Orbán appointed Dr. Budai to the position of “commissionaire of the prime minister responsible for the investigation of the unlawful sale and privatization of state lands.”⁴⁶¹ According to a news article by *Magyar Nemzet* of 9 June 2010, Dr. Budai was to investigate “the previous government’s scandalous cases in state owned land sales (cases that are suspected to involve criminal acts),” including the cases of Bábolna and Sukoró.⁴⁶² In a news article by *Magyar Hirlap* published on 16

⁴⁵⁷ **Exhibit C-230**; cf. **Exhibit C-222**.

⁴⁵⁸ Gyurcsány, ¶ 22.

⁴⁵⁹ Langhammer I, ¶ 60.

⁴⁶⁰ **Exhibit C-91**.

⁴⁶¹ **Exhibit R-179**.

⁴⁶² **Exhibit C-92**.

June 2010, Dr. Budai stated that his “*primary task will be to explore the Sukoró land swap and the sale of the state-owned lands at Bábolna.*”⁴⁶³ According to Respondent, the land swap transaction at Sukoró was high on the list of cases to be investigated by Dr. Budai due to “*the highly suspicious circumstances surrounding the Land Swap Agreement and the media attention that it had attracted.*”⁴⁶⁴

397. According to a news article from the *Budapest Times* dated 19 July 2010, former Prime Minister Gyurcsány became the focus of the newly-elected Fidesz Government’s campaign to “*hold to account*” the former administration. The article further stated:

“*[T]he appointment of a prime ministerial commissioner to look into the Sukoró case is in line with the commitment by Orbán and the Fidesz government to ‘hold to account’ politicians and public figures suspected of corruption during the eight years that the Socialists were in government.*”⁴⁶⁵

398. On 28 July 2010, Dr. Budai delivered a press conference at which he accused former Prime Ministers Bajnai and Gyurcsány of having “*testified falsely before the prosecution*” in the “*Sukoró*” case.⁴⁶⁶ The former Prime Ministers both reacted to this accusation by suing Dr. Budai, on 12 August 2010, for defamation and infringement of their rights to privacy.⁴⁶⁷ They later prevailed in those cases.⁴⁶⁸

399. On 9 September 2010, Prime Minister Orbán stated in an interview with *Inforádió* that, as regards the casino city planned in Sukoró: “*[I]t’s a dead case. It will soon take its place in the criminal chronicles.*”⁴⁶⁹

400. On 13 September 2010, Dr. András Schiffer, leader of the green liberal Party (LMP), presented a parliamentary interpellation in which he asked about the future envisaged by the Government for the Lake Velence region and requested the revocation of the Project’s Special Project Status.⁴⁷⁰ In response to this interpellation, on the same day,

⁴⁶³ **Exhibit C-301.**

⁴⁶⁴ Counter-Memorial, ¶¶ 241, 243.

⁴⁶⁵ **Exhibit C-156.**

⁴⁶⁶ **Exhibit C-163.**

⁴⁶⁷ **Exhibit C-164.**

⁴⁶⁸ In September 2012, Dr. Budai was ordered by the Tribunal of Budapest Region to publicly apologize to former Prime Ministers Bajnai and Gyurcsány on several news portals and pay each of them HUF 300,000 for the damage caused to their reputations. **Exhibit C-312.**

⁴⁶⁹ **Exhibit C-151.**

⁴⁷⁰ **Exhibit R-145.**

Dr. Matolcsy, Minister of National Economy, gave a speech in Parliament in which he announced:

*“There will be no casino at Sukoró. We all know that. [...] there will be no casino town or manufacturing town round the Lake Velence. [...] clever, relaxing investment will take place at Lake Velence which will help the national tourism and which will be a jewel of the domestic tourism. [...] I have given an order to revoke the special project status.”*⁴⁷¹

401. On 14 September 2010, Minister Matolcsy issued a proposal for the Government on the revocation of the Project’s Special Project Status. The proposal represents a formal government document indicating its position on Special Project Status. It stated in relevant part:

“According to the new plans of the government – based on environmental and touristic considerations – the casino town shall not be implemented at Sukoró. Instead, [...] such developments and changes shall take place which can provide a real possibility of recreation and resting.

[...]

Public policy aim of the proposal

*The proposal aims at putting an end to the land speculation in the region of Lake Velencei. It also aims at revoking the special project status of the investment planned to be implemented in the outskirts of Sukoró.”*⁴⁷²

402. Minister Fellegi also stated in his second witness statement:

*“[T]he development of a mega-casino on the shores of Lake Velence would have been inconsistent with the policy of the new government to protect such sites and to promote ‘green tourism’. The revocation of special project status was therefore in line with the government’s touristic and environmental policy.”*⁴⁷³

403. However, at the same time, Minister Fellegi stated:

⁴⁷¹ **Exhibit C-181.**

⁴⁷² **Exhibit R-94.** The Tribunal notes that this proposal was unanimously supported by the Secretaries of State during their meeting on 16 September 2010. On 23 September 2010, Prime Minister Orbán signed Government Decree 240/2010 (IX.23.) revoking the Project’s Special Project Status; the Decree was approved by the Government at its 10 November 2010 session. **Exhibits R-146, C-182 and C-320;** Nagy, ¶¶ 15-17.

⁴⁷³ Fellegi II, ¶ 12.

“[I]t made no sense to keep the special project status in Sukoró when the position of the government was that the land swap was null and void. In this context, the decision to revoke the special project status [...] was a natural move. In my view, this should have been done by the prior government which had referred the Sukoró land swap transaction to the Hungarian courts.”⁴⁷⁴

404. Dr. Róza Nagy also explained in her witness statement that the revocation was based in part on the fact that *“the implementation of the Project in Sukoró was in contradiction with environmental goals.”* She further stated that she was advised in that context that *“the legal requirements to maintain the Sukoró-specific special project status [were] absent considering that the land swap transaction at Sukoró was null and void.”⁴⁷⁵*

d) Dr. Budai’s Actions Following His Appointment as Prime Minister’s Commissioner

405. The Tribunal has also carefully reviewed the various acts and statements of Dr. Budai following his appointment as Prime Minister’s commissioner on 8 June 2010.

406. In a press conference on 22 September 2010, *i.e.*, before the revocation of the Project’s Special Project Status was officially announced, Dr. Budai referred to the last session of the Gyurcsány Government on 8 April 2009 in which the status had been granted to the Project, and stated that, in the preparatory document intended for that session, *“the competent person of the then Ministry of Finance drew the attention to the fact that there is no legal grounds for classifying [the Project] a high priority investment from a national point of view, and he has suggested to the cabinet that the approval for the proposal should be postponed. However, the government has brought its decision in the matter.”* Dr. Budai further stated that Special Project Status should not have been granted by the previous Government, as the *“legal conditions”* had never been in place because the Concession Contract had not been signed at the time the status was granted. Similarly, he considered that *“the allocation of HUF 2.6 billion to the investor, as a state support [was] without any legal grounds.”* Dr. Budai concluded that former Prime Ministers Gyurcsány and Bajnai both *“must have known about these facts”* and *“their actions may be deemed as abuse of power.”⁴⁷⁶*

⁴⁷⁴ Fellegi II, ¶ 11.

⁴⁷⁵ Nagy, ¶ 13.

⁴⁷⁶ Exhibit C-169.

407. In a letter to Minister Matolcsy dated 5 October 2010, Dr. Budai referred to “[t]he full scale investigation of the King’s city investment” and quoted from various provisions of the Concession Contract. He concluded:

“The acquisition of the Sukoró properties for the activity described by the concession contract within the deadline is very doubtful at the moment, since there is an ongoing lawsuit to revoke the Sukoró-Albertirsa land swap agreement and to reinstate the original conditions.

Based on the foregoing, please consider the termination of the concession contract on 1 January, 2011, with special consideration to the fact that the special project status of the King’s city investment was revoked by the government.”⁴⁷⁷

408. Dr. Róza Nagy responded to Dr. Budai’s letter by letter of 17 November 2010:

“We have examined all grounds for termination set out in concession contract concluded between the Ministry of Finance and KC Bidding Kft. on 9 October 2009 – including the ones referenced in your letter – and we have found that the concession contract shall be terminated only after 1 January 2011, on the condition that the Concession Receiver fails to comply with the clauses referenced in your letter. However, since the Concession Receiver has until the end of 2010 to comply with the relevant clauses, the termination of the concession contract, as of today, is untimely.”⁴⁷⁸

409. On 27 October 2010, Dr. Budai participated in an interview with *Magyar Demokrata* magazine, in which he linked the revocation of Special Project Status with the potential termination of the Concession Contract:

“[I]f [the Project Sponsors] wish to acquire any sort of permission or license they should do that via the established procedures, which is a far longer process. The conclusion is that they will not have any construction license or permission; therefore the state can cancel the concession agreement on the 1st of January 2011. In this case King City [...] will have to pay the state a penalty of 900 million HUF.”⁴⁷⁹

410. In this regard, the Tribunal notes that Dr. Róza Nagy stated in her witness statement that she considered that the revocation of Special Project Status would have “no con-

⁴⁷⁷ Exhibit R-150.

⁴⁷⁸ Exhibit R-156.

⁴⁷⁹ Exhibit C-231.

sequences [...] on Hungary's obligations to the King's city investors"⁴⁸⁰ and "*no incidence on the Concession Contract.*"⁴⁸¹

411. Minister Fellegi stated in his first witness statement:

*"The termination of the Concession Contract was not raised in the government proposal for the revocation of the special project status and was not discussed during the government session when the revocation was approved."*⁴⁸²

412. Following the expiration of the contractual deadline on 1 January 2011, in an interview with *Magyar Nemzet* on 5 January 2011, Dr. Budai stated that "*the government's standpoint is clear: there will not be a casino in Sukoró.*" In his view, the fact that the Project Sponsors had named the Sukoró Site as the final site for the Project was "*nothing better than a joke.*" According to Dr. Budai, "*the concession right of the investor of King's City automatically expired on 1 January 2011*" and KC Bidding would now have to pay HUF 900 million as penalty fees to the Hungarian State.⁴⁸³

413. On 6 January 2011, Dr. Budai participated in a working-level meeting with representatives of the Government, in which the possibility of terminating the Concession Contract and the State's claim for a penalty for frustration were discussed.⁴⁸⁴ In a letter to Dr. Róza Nagy of the same day, Dr. Budai cited various provisions of the Concession Contract and explained why he considered them to have been breached. He concluded:

"Based on the foregoing, and with due consideration to the fact that the deadline stipulated in the concession contract is overdue, I repeatedly request [sic] the termination of the concession contract with immediate effect, with special consideration to the fact that the spe-

⁴⁸⁰ Nagy, ¶ 15.

⁴⁸¹ Nagy, ¶ 19.

⁴⁸² Fellegi I, ¶ 13.

⁴⁸³ **Exhibit C-346.**

⁴⁸⁴ The Tribunal notes that Dr. Róza Nagy stated in her witness statement that she had "*no recollection of [the 6 January 2011] meeting*" and assumed that it was only held "*to inform all parties of the Ministry's decision to terminate the Concession Contract.*" Nagy, ¶ 44. Respondent does not contest, however, that this meeting took place and that Dr. Budai participated in it. Respondent's Post-Hearing Brief, ¶ 220. The memorandum for Minister Matolcsy, prepared by Dr. Kardkovács and Dr. Körösmezei on 7 January 2011, also refers to the meeting (mistakenly referred to as the meeting of 6 January 2010) having been held "*with the participation of government commissioner Gyula Budai.*" **Exhibit R-160.**

cial project status of the King's City investment was revoked by the government."⁴⁸⁵

414. On 7 January 2011, the newspaper *Magyar Nemzet* reported that the Concession Contract was "*likely to be cancelled*" and referred to government commissioner Dr. Budai who had told the paper after a meeting at the Government Audit Office the day before that "*representatives of the affected ministries and the audit office were in agreement that the contract should be cancelled*" because Mr. Blum and KC Bidding "*have failed to meet the conditions included in the concession contract.*"⁴⁸⁶
415. On 8 January 2011, the Fidesz Party issued a press release, according to which Dr. Budai said: "*In Sukoró no casino city is going to be built, neither now, nor in the future*" and further that he had turned to Minister Matolcsy on 5 January 2011 "*with the issue to terminate immediately the concession agreement.*" Dr. Budai announced that "*[t]his termination is going to be made in writing during the next week*" and added that he had requested that the Minister demand the contractual penalty of HUF 900 million. Dr. Budai concluded:

*"With investors who intend to outmaneuver the regulations, or ignoring them, and who wish to validate their individual interests at the expense of others, the government does not wish to negotiate, neither now nor in the future. The fact is that the management of KC Bidding and King's City belongs to this circle."*⁴⁸⁷

e) The Tribunal's Evaluation of the Evidence

416. The Tribunal cannot but note the strong attacks on the Project at Sukoró and the sometimes inflammatory language employed by Dr. Budai and certain other representatives of the Fidesz Party. Many of the incidental actors in this case brought and won defamation actions in the courts of Hungary against Dr. Budai for some of his public statements, including Dr. Klára Horváth (Mayor of Bábolna),⁴⁸⁸ Mr. Miklós Tátrai

⁴⁸⁵ **Exhibit R-159.** Dr. Róza Nagy stated in her witness statement that Dr. Budai's letter was located in the archives of the Ministry of National Economy, even though she had "*no recollection of receiving this letter.*" Nagy, ¶ 45.

⁴⁸⁶ **Exhibit C-201.**

⁴⁸⁷ **Exhibit C-123.**

⁴⁸⁸ On 8 November 2011, the Budapest Court of Appeal affirmed the decision of the Municipal Court of Budapest at the first instance that, in making false allegations at a press conference on 16 August 2010 regarding the falsification of public documents and linking her to corruption cases, Dr. Budai had unlawfully damaged the Mayor of Bábolna's reputation, and ordered the Fidesz Party and Dr. Budai to publish the judgment on the Fidesz Party's website for at least 30 days and to express their regret over the violations of Hungarian law and to pay damages. **Exhibits C-143 and C-311.**

(former CEO of the MNV)⁴⁸⁹ and former Prime Ministers Bajnai and Gyurcsány.⁴⁹⁰ Ultimately, Dr. Budai was dismissed from his position as the Prime Minister's Commissioner as of 31 August 2012.⁴⁹¹ The Tribunal notes the foregoing in evaluating the evidence, without losing sight of the fact that many of these statements were made in the context of the upcoming national elections in April 2010.

417. In summary, the above evidence shows that the Fidesz Government had essentially three reasons for opposing the realization of the Project at Sukoró. First, the Government suspected corruption in connection with the Land Swap Agreement. Second, it adopted the position that the Land Swap Agreement was null and void – building upon the actions of the MNV under the interim Government of Prime Minister Bajnai, which had initiated a lawsuit before the Hungarian courts in November 2009 to “*restore the original status.*” Third, the Government had developed new environmental and eco-tourism policies applicable to the Lake Velence region. The Tribunal is of the view that, if established, the environmental and touristic policies and the anti-corruption concerns would constitute true public policy reasons for opposing the implementation of the Project at Sukoró. The Tribunal will therefore discuss these possible reasons in detail.

(i) The Anti-Corruption Concerns

418. As regards the anti-corruption concerns, the above evidence shows that the Fidesz Party had made the fight against suspected corruption in the former Socialist Government, including the interim Government of Prime Minister Bajnai, a major issue of its election campaign and that Sukoró was one of the cases on its “*10+1*” list to be investigated after the change of government. The record shows that, once in office, Prime Minister Orbán appointed Dr. Budai as his Commissioner “*responsible for the investigation of the unlawful sale and privatization of state lands.*”⁴⁹² Not only did this investigation include Sukoró and the Land Swap Agreement, but Dr. Budai regarded this particular case as a priority task.

⁴⁸⁹ On 17 July 2012, the Metropolitan Court ordered Dr. Budai to publicly apologize and pay damages to Mr. Tátrai for falsely accusing Mr. Tátrai of accepting funds related to the Bábolna case. **Exhibit C-174.**

⁴⁹⁰ On 27 September 2012, the Court of Budapest Region ordered Dr. Budai to publicly apologize to former Prime Ministers Bajnai and Gyurcsány and to pay HUF 300,000 to each of them for the damage caused to their reputations by stating at a press conference on 28 July 2010 that there were documents proving that the former Prime Ministers had witnessed falsely in the prosecution. **Exhibit C-312.**

⁴⁹¹ **Exhibit C-179.**

⁴⁹² **Exhibit R-179.** See ¶ 398 above.

419. In the Tribunal's view, these documents evidence that the allegations of corruption were not only a major issue in the Fidesz election campaign, but continued to be an important political reason for the Fidesz Government's opposition to the implementation of the Project at Sukoró.
420. The Tribunal notes at this point that none of the allegations of corruption were ultimately proven and the investigations into former Prime Minister Gyurcsány relating to the crime of abuse of administrative authority were terminated on 30 July 2012 "*because of failure to prove.*"⁴⁹³ The Tribunal also notes that Dr. Császy and Mr. Tátrai of the MNV, who were at one time arrested and detained after the Fidesz Government took power,⁴⁹⁴ were ultimately never charged with corruption in connection with the land swap.⁴⁹⁵
421. Nevertheless, the above evidence shows that anti-corruption, in particular relating to the Sukoró land swap (even if unfounded), constituted a public policy concern of the Fidesz Government and that, after the Concession Company certified Sukoró as the Project site, such public policy concern may well have played a role in the Government's decision to terminate the Concession Contract. In particular, Dr. Budai's statements following the expiration of the contractual deadline on 1 January 2011 and his apparent involvement in the decision-making process leading up to the termination on 10 January 2011⁴⁹⁶ indicate that the suspicions of corruption, which were his primary concern as Prime Minister's Commissioner investigating into the Sukoró land swap, may have influenced the Government's decision to terminate the Concession Contract after it had become certain that the Project Sponsors intended to implement the Project at Sukoró (based on the very land swap that Dr. Budai was tasked to investigate).

(ii) New Environmental and Touristic Policies

422. As to the environmental and touristic policy reasons, the Tribunal notes that most of the documents submitted as evidence by Claimant specifically relate to Sukoró; there are only a few pieces of evidence that could suggest a broader public policy against casino projects in Hungary generally.

⁴⁹³ **Exhibit C-353.**

⁴⁹⁴ Császy I, ¶ 70; Tátrai I, ¶¶ 41 *et seq.*

⁴⁹⁵ According to a news article published by MTI on 5 July 2012, the Tatabánya Court acquitted Mr. Tátrai from the accusation of misappropriation causing asset detriment of high value. **Exhibit C-173.** Dr. Császy's testimony during the Hearing that he was never found guilty of the crime of corruption was not challenged during cross-examination. Transcript, p. 1135 lines 14-19.

⁴⁹⁶ See ¶¶ 414-417 above.

423. As regards the statements of local politicians of Fejér County,⁴⁹⁷ even though their language does not always appear to be limited to the implementation of the Project at Sukoró, it seems reasonably clear from the context in which those statements were made that the concerns of those politicians related primarily to the future of the Lake Velence region.
424. By contrast, the comments made by Dr. Orbán, then leader of the opposition party, during a TV interview on 18 September 2009, (*i.e.*, before the Concession Contract was signed),⁴⁹⁸ do reveal an aversion on his part (and by extension the Fidesz Party) to the concept of a casino industry in Hungary.
425. In addition, there is evidence relating to the potential alternative site in Székesfehérvár. The Tribunal notes that, while the resolution proposed by Dr. Balogh on 17 December 2009⁴⁹⁹ was never passed and her opinion therefore cannot necessarily be taken to reflect the position of the Fejér County General Assembly, the statement made by Mr. Cser-Palkovic as assistant spokesman for the Fidesz Party on 15 January 2010⁵⁰⁰ and, in particular, the press release issued by the Fidesz Party on 6 April 2010,⁵⁰¹ in which it refers to its own “*initiative*” that led the local government of Székesfehérvár to withdraw its consent to the Project, do suggest that the Fidesz Party actively sought to ensure that Székesfehérvár would not be available as a Project site and thus also suggest that it was opposed to the Project as a whole.
426. However, the Tribunal must have regard to the context in which those comments and statements were made. As the interview with Dr. Orbán was conducted while the Fidesz Party was in opposition, Dr. Orbán’s statements formed part of a legitimate political discourse concerning the casino industry in Hungary, which was inevitably heightened in the campaign preceding the national elections. The statements relating to the Székesfehérvár site likewise need to be assessed against this background. The Tribunal further notes that the opposition of the Fidesz Party clearly did not reflect the position of the interim Government, as evidenced by Dr. Oszkó’s letter to the mayor of Székesfehérvár dated 8 March 2010.⁵⁰² In the Tribunal’s view, Dr. Oszkó’s letter shows that the interim Government of Prime Minister Bajnai still supported the Project’s realization at alternative sites, including Székesfehérvár. This position is also

⁴⁹⁷ See ¶¶ 370, 374-375 and 397 above.

⁴⁹⁸ Exhibit C-302. See ¶ 376 above.

⁴⁹⁹ Exhibit C-328. See ¶ 383 above.

⁵⁰⁰ Exhibit C-261. See ¶ 384 above.

⁵⁰¹ Exhibit C-327. See ¶ 386 above.

⁵⁰² Exhibit R-83. See ¶ 385 above.

confirmed by the press release issued by the Ministry of Finance on 9 October 2009, *i.e.*, the day the Concession Contract was signed.⁵⁰³ The press release shows that, even though the interim Government sought to restore the pre-swap conditions with regard to the Sukoró Site, it contemplated that the Project was still viable and that the Project Sponsors could realize the Project at one of the other possible locations.

427. While the Tribunal is of the view that the statements made by members of the Fidesz Party while in opposition may nevertheless be relevant to interpret the actions of the Fidesz Government after it took power on 29 May 2010, it also observes that, as the statements of the Fidesz Party were made in the course of an election campaign, one cannot simply assume that they would represent the official position of the Fidesz Party once in government. Experience shows that a political party may, by the very fact of being in opposition, make statements which it would not actually follow as an elected governing party, since it then becomes responsible for complying with the State's existing obligations. In particular, Dr. Róza Nagy's testimony indicates that, even though the new Government might have been opposed to casino projects such as the Project in the future, it was committed to respect those contracts that had already been concluded.⁵⁰⁴ This approach of the Fidesz Government is confirmed by Dr. Nagy's letter to Dr. Budai dated 17 November 2010, in which she stated that the Concession Contract would only be terminated "*on the condition that the Concession Receiver fails to comply with the [contractual] clauses referenced in [Dr. Budai's] letter.*"⁵⁰⁵ Dr. Kardkóvác's letter of 17 December 2010 to Mr. Langhammer also shows that the Government intended to proceed pursuant to the provisions of the Concession Contract.⁵⁰⁶
428. In the Tribunal's view, those clear statements as to the new Government's commitment to respect the Concession Contract are not refuted by Dr. Orbán's statement in an interview on 9 September 2010, referring to the "*casino city planned in Sukoró*" as "*a dead case.*"⁵⁰⁷ Even though the Tribunal considers this statement to be unequivocal evidence that Dr. Orbán, and by extension the Fidesz Government, was opposed to the establishment of the Project at Sukoró, the Tribunal notes that the precise context in which Dr. Orbán made this statement is unclear. It cannot be discerned from the document whether Dr. Orbán had been questioned as to the Project as a whole and re-

⁵⁰³ **Exhibit C-128.** See ¶ 380 above.

⁵⁰⁴ Transcript, p. 1460, lines 6-17; *cf.* Nagy, ¶ 10. The Tribunal also notes in this regard that, notwithstanding this testimony, the evidence in the record shows that the Ministry of National Economy had plans in July 2013 to call a closed tender for ten new casino concessions to operate outside Budapest. **Exhibit C-416.**

⁵⁰⁵ **Exhibit R-156.** See ¶ 410 above.

⁵⁰⁶ **Exhibit C-234.** See ¶ 388 above.

⁵⁰⁷ **Exhibit C-151.** See ¶ 401 above.

stricted his remarks to Sukoró, or whether he was only questioned about Sukoró in the first place. As a result, the evidence is ambiguous.

429. In the Tribunal's view, there is no conclusive evidence in the record that the new Government adopted a general policy against the implementation of the Project in Hungary, *i.e.*, that the Fidesz Government sought to prevent the Project from being realized regardless of the site that Claimant may have chosen – the “*hidden political agenda*” to destroy the Project alleged by Claimant.
430. On the other hand, the evidence does show that, while the Fidesz Party was mainly focused on the suspicions of corruption during its election campaign, once it was in power, it developed new environmental and touristic policies applicable to the Lake Velence region.
431. The new environmental and touristic policies first led to the revocation of the Project's Special Project Status. Minister Matolcsy's proposal for the Government on the revocation of Special Project Status, which was unanimously approved at the meeting of the Secretaries of State,⁵⁰⁸ described the new Government's position towards the Project in the following terms: “*According to the new plans of the government – based on environmental and touristic considerations – the casino town shall not be implemented at Sukoró.*”⁵⁰⁹
432. In this context, the Tribunal has also looked at Dr. Budai's interview of 27 October 2010.⁵¹⁰ The statement could indeed suggest, as argued by Claimant,⁵¹¹ that the Government cancelled the Special Project Status in order to make it impossible for the Project Sponsors to secure any site for the Project by 1 January 2011, which would in turn give Respondent the right to terminate the Concession Contract.
433. However, the Tribunal notes that the termination of the Concession Contract is not mentioned in Minister Matolcsy's proposal for the revocation and, according to Minister Fellegi, it was not discussed in the Government session in which the revocation was approved.⁵¹² Dr. Róza Nagy also stated in her witness statement that she did not consider the two events to be linked.⁵¹³

⁵⁰⁸ Exhibit R-146.

⁵⁰⁹ Exhibit R-94.

⁵¹⁰ Exhibit C-231. See ¶ 409 above.

⁵¹¹ Memorial, ¶ 477.

⁵¹² Fellegi I, ¶ 13. See ¶ 413 above.

⁵¹³ Nagy, ¶¶ 15, 19. See ¶ 412 above.

434. The Tribunal further observes that the Project's Special Project Status related only to the implementation of the Project "*in the outskirts of the community of Sukoró.*"⁵¹⁴ The Tribunal therefore agrees with Respondent that the status "*could have been of no assistance in the search for an alternative Project site and thus had no impact on KC Bidding's ability to comply with the contractual deadline to secure a Project site*"⁵¹⁵ in any of the 132 alternative settlements.
435. Moreover, the Tribunal has not seen evidence sufficient to establish that Dr. Budai played any role in the process leading up to the revocation of Special Project Status. Claimant does not contend that Dr. Budai was involved in the preparation of the proposal for the Government or that he participated in the 16 September 2010 meeting of the State Secretaries or the 10 November 2010 session of the Government. Claimant only relies on a document summarizing Dr. Budai's press conference of 22 September 2010⁵¹⁶ and asserts that it was he who announced the revocation of Special Project Status on this occasion, *i.e.*, one day before the Government Decree was signed by Prime Minister Orbán.
436. However, in the Tribunal's view, the document referred to by Claimant does not support this allegation. Rather, properly understood, the statement quoted by Claimant that "*the government has brought its decision in the matter*"⁵¹⁷ does not refer to the decision to revoke Special Project Status, but rather to the decision by which the previous Government initially granted Special Project Status to the Project in April 2009.⁵¹⁸ In any event, the document does not prove that Dr. Budai influenced the Government's decision to revoke Special Project Status.
437. The Tribunal notes that Minister Fellegi also stated in his first witness statement that he had "*no recollection of being approached by Dr. Budai to discuss this matter*" and further that Dr. Budai had "*no authority or influence over any decisions made by the government.*"⁵¹⁹
438. Dr. Róza Nagy similarly stated in her witness statement that "*Dr. Budai had no influence whatsoever on the decisions that were taken by the Ministry with regard to the Project.*"⁵²⁰ She referred in particular to Dr. Budai's request to terminate the Conces-

⁵¹⁴ **Exhibit C-42.**

⁵¹⁵ Respondent's Post-Hearing Brief, ¶ 172.

⁵¹⁶ **Exhibit C-169.** See ¶ 408 above.

⁵¹⁷ Claimant's Post-Hearing Brief, ¶ 139.

⁵¹⁸ **Exhibit C-169.**

⁵¹⁹ Fellegi I, ¶ 16.

⁵²⁰ Nagy, ¶ 27.

sion Contract in his letter of 5 October 2010⁵²¹ and stated that this request was reviewed by the Ministry, which concluded that “*the Ministry was not entitled to terminate unless and until KC Bidding fails to comply with its obligation.*”⁵²² This is also confirmed by her response to Dr. Budai of 17 November 2010.⁵²³

439. In the Tribunal’s view, Claimant has not established that Dr. Budai took part in the decision-making process regarding the revocation of Special Project Status. Consequently, the Tribunal cannot conclude from the evidence that the Government’s decision to revoke Special Project Status was necessarily taken in order to make it impossible for the Project Sponsors to secure an alternative Project site by the contractual deadline of 1 January 2011, as suggested by Dr. Budai’s statement of 27 October 2010.
440. Nevertheless, the Tribunal considers that the revocation does show that, under the new environmental and touristic policies of the Fidesz Government applicable to the Lake Velence region, Sukoró was no longer acceptable as a site for the Project. Minister Fellegi and Dr. Róza Nagy both confirmed in their witness statements that, besides the new Government’s position that the Land Swap Agreement was null and void, the implementation of the Project at Sukoró would be “*inconsistent*”⁵²⁴ or “*in contradiction with*”⁵²⁵ the Government’s new environmental and touristic policies. Thus, the Tribunal considers it established that the Government had a public policy reason for not wanting the Project to be implemented at Sukoró.

f) The Tribunal’s Conclusion

441. In summary, Claimant has not established that the Fidesz Government adopted a general policy against the realization of the Project in Hungary. However, Claimant has submitted conclusive evidence that the Fidesz Government was opposed to the implementation of the Project at Sukoró based on its new environmental and touristic policies. In the Tribunal’s view, after the Project Sponsors had certified Sukoró as the Project site, these new environmental and touristic policies constituted a public policy reason behind the termination of the Concession Contract because, as clearly stated in the – unanimously approved – Proposal for the revocation of Special Project Status, the new Government had determined that, “*based on environmental and touristic consid-*

⁵²¹ **Exhibit R-150.** See ¶ 409 above.

⁵²² Nagy, ¶ 31.

⁵²³ **Exhibit R-156.** See ¶ 410 above.

⁵²⁴ Fellegi II, ¶ 12. See ¶ 404 above.

⁵²⁵ Nagy, ¶ 13. See ¶ 406 above.

*erations, [the Project] shall not be implemented at Sukoró.”*⁵²⁶ This would be sufficient to conclude that Respondent acted in its sovereign capacity when it terminated the Concession Contract. In addition, as stated before, the corruption concerns (although never proven) may also have played a role in the Government’s decision to terminate the Concession Contract, and if so, would also constitute a public policy reason for the contractual termination.

442. Were this the end of the Tribunal’s analysis, this could lead to a finding of expropriation. However, as noted above, the Tribunal must now determine as a further step whether Respondent – in addition to its public policy reason – also had contractual grounds for terminating the Concession Contract and, if that is the case, whether it was legitimate for Respondent to exercise its right to terminate on those grounds.

F. Did Respondent Have Contractual Grounds for Terminating the Concession Contract?

1. Summary of Claimant’s Position

a) Respondent’s Purported Termination Grounds Do Not Justify the Termination of the Concession Contract

443. Claimant submits that the Termination Letter was based on improper reasons.

(i) SDI Europe Had the Legitimate Right of Possession to and the Right to Build on the Sukoró Site

444. Claimant first refers to Respondent’s allegation that KC Bidding breached Clause 9.3 of the Concession Contract because it failed to certify that SDI Europe had the “*legitimate right of possession*” and the “*right of encroachment*” with regard to the Sukoró Site. Clause 9.3 provides, in relevant part:

*“Starting from January 1, 2011 up to the expiry of the concession period, the Concession Company shall continuously hold the legitimate right to possession of the real properties for establishment of the Casino, [...] and the right to encroachment of the necessary superstructures within the settlement where the activity subject to concession is exercised.”*⁵²⁷

⁵²⁶ Exhibit R-94.

⁵²⁷ Exhibit C-1.

445. Claimant submits that the Concession Company had “*lawful possession*” and the “*right to build*,” which corresponds to the “*right to encroachment*,”⁵²⁸ in accordance with Clause 9.3 of the Concession Contract.⁵²⁹ Claimant argues that, under Hungarian law, the owner of land is entitled to transfer possession of that land to another person and, in so doing, the person to whom possession is given is entitled to use that land. Further, as established by Hungarian court practice, the “*right to build*” is encompassed within the right to use the land.⁵³⁰
446. In this case, Claimant notes that Respondent transferred possession of the Sukoró Site to Mr. Blum through the Land Swap Agreement and thereby accepted that the land would be used by the new possessor, Mr. Blum, even prior to the registration of his ownership in the Land Registry.⁵³¹ As a consequence, Claimant is of the view that the subsequent finding of invalidity of the Land Swap Agreement by the Hungarian courts has no bearing on Mr. Blum’s “*lawful possession*” or his “*right to build*,” as it could not extinguish Respondent’s “*consensual transfer of possession of the lands, which is a legal transaction distinct from the Land Swap Agreement*” under Hungarian law.⁵³²
447. Claimant submits that Mr. Blum’s possession was “*lawful*” as it was based on Respondent’s “*unequivocal consent and authorisation*,” which is reflected in the Registration Authorization and the Handover Protocol.⁵³³ Claimant refers to its expert Dr. Tausz, who stated in his expert opinion that “[i]n the Registration Authorisation, the Respondent consented to Mr. Blum exercising all the ownership rights over the Sukoró Real Properties. [...] This included the owner’s consent to build, which [...] is part of the owner’s rights.”⁵³⁴ Claimant further refers to Dr. Tausz’s observation that the Handover Protocol reflected the “*mutual, uniform intention of the parties to transfer possession of the [Sukoró] Properties from the Respondent to Mr. Blum*” as well as Prof. Kisfaludi’s statement that the Handover Protocol represented the “*common will of the parties to carry out such a transfer*.”⁵³⁵

⁵²⁸ Counter-Memorial, ¶ 373.

⁵²⁹ Reply, ¶ 265.

⁵³⁰ Reply, ¶¶ 258, 427.

⁵³¹ Reply, ¶¶ 259, 427.

⁵³² Reply, ¶¶ 259-260; *cf.* Claimant’s Post-Hearing Brief, ¶ 279.

⁵³³ Reply, ¶¶ 260 *et seq.*, 428; *cf.* Claimant’s Post-Hearing Brief, ¶¶ 280-281.

⁵³⁴ Reply, ¶ 262; Tausz II, ¶ 2.4.3.5.1.

⁵³⁵ Reply, ¶ 263; Tausz II, ¶ 2.4.2.4.3; Kisfaludi, ¶ 12.

448. Claimant submits that, subsequently, nothing prohibited Mr. Blum from transferring this “*lawful possession*” to KC Bidding, and then KC Bidding from assigning this right to the Concession Company.⁵³⁶
449. Claimant further contends that Respondent made no effort to take back possession of the Sukoró Site or otherwise demonstrate that it did not consider the Sukoró Site to be available as a Project site, such as repayment of the sum that Mr. Blum had paid pursuant to the Land Swap Agreement.⁵³⁷

(ii) Claimant Was Not Required to Establish the Concession Company Within the Administrative Territory of the Project Site as at 1 January 2011

450. Claimant secondly refers to Respondent’s allegation that KC Bidding had failed to comply with Clause 9.3 of the Concession Contract because, after having established the Concession Company in Székesfehérvár, KC Bidding was required in accordance with Clause 7.1.2 to certify a Project Site in Székesfehérvár rather than in Sukoró. Clause 7.1 of the Concession Contract provides, in relevant part:

“[...] The Concession Company should meet the following requirements at the same time of establishing and throughout the concession period as well.

7.1.2. The headquarters of the Concession Company shall be located within the territory of the settlement where the activity subject to concession is exercised.”

451. Claimant submits that, as Respondent could not terminate the Concession Contract with immediate effect on the basis of Clause 7.1.2, it “*employed a contrived and baseless interpretation of Clause 9.3 to do so by another route.*”⁵³⁸ Claimant argues that, despite KC Bidding’s having notified Respondent on 21 December 2010 that it had acquired lawful possession of the Sukoró Site, Respondent “*somehow*” concluded from the fact that the headquarters of SDI Europe was “*formally located*” in Székesfehérvár that KC Bidding had chosen Székesfehérvár to be the settlement in which the concession activity would be exercised.⁵³⁹

⁵³⁶ Reply, ¶¶ 264, 429; Claimant’s Post-Hearing Brief, ¶ 281.

⁵³⁷ Claimant’s Post-Hearing Brief, ¶ 282.

⁵³⁸ Reply, ¶ 473.

⁵³⁹ Reply, ¶ 473; Memorial, ¶ 287.

452. Claimant contends that, according to Respondent's interpretation of the Concession Contract, KC Bidding would have been required to determine within 90 days of the signing of the Concession Contract (*i.e.*, the time limit for establishing the Concession Company) where the concession activity would be exercised. Conversely, it is Claimant's position that Clauses 7.1 and 4.2 required KC Bidding to locate the seat of the Concession Company at the place of the concession activity only once those activities had commenced.⁵⁴⁰
453. In Claimant's view, Respondent's internal correspondence and that with KC Bidding throughout 2010 "*reveals its lack of belief in this illogical interpretation of Clauses 7.1.2 and 9.3*" because it shows that Respondent did not consider KC Bidding to be limited to Székesfehérvár after SDI Europe was established there on 21 January 2010.⁵⁴¹
454. Claimant further asserts that Respondent, relying on Clause 7.1.2 alone, based the termination of the Concession Contract on the fact that the Concession Company was located in Székesfehérvár rather than in Sukoró. In response to Respondent's interpretation of the clause that the Concession Company "*had to be located in the actual settlement chosen by KC Bidding from the list in Annex 1 of the Concession Contract,*" Claimant relies on its expert Dr. Tausz who opined that Respondent's argument is based on Clause 7.1.2 "*read in isolation, without regard to the Concession Contract as a whole,*" which results in an "*absurd*" interpretation of the provision.⁵⁴²
455. Claimant argues that Clause 5 of the Concession Contract provides that the concession activity may be exercised within the administrative area of one of the 133 settlements contained in Annex 1, whereas Clause 9.3 requires the Concession Company to have "*lawful possession*" and the "*right to build*" for the real properties on 1 January 2011. As the final location of the concession activities did not have to be determined at the time that the Concession Company was established, the Concession Contract did not require the headquarters of the Concession Company to be established at Sukoró rather than at Székesfehérvár, which was also one of the 133 potential settlements.⁵⁴³ Claimant refers to the statement of its expert Dr. Tausz that it would therefore be "*nonsensical to apply the requirement of Clause 7.1.2 for the time of establishment of the Con-*

⁵⁴⁰ Reply, ¶ 475.

⁵⁴¹ Reply, ¶¶ 476, 477.

⁵⁴² Reply, ¶¶ 268-269; Tausz II, ¶ 2.2.2.5.

⁵⁴³ Reply, ¶¶ 270-271.

*cession Company, at which point in time the location of the concession activity is not yet known.”*⁵⁴⁴

456. Claimant further asserts that Respondent ignores the wording of the preceding Clause 7.1, according to which “*the following requirements [should be met by the Concession Company] at the same time of establishing and throughout the concession period as well.*” Pursuant to Clause 4.2, the concession period shall start at the date on which the license for performing the concession activity is granted. Claimant contends that, as the concession period never started, KC Bidding was not obliged to move the seat of the Concession Company to the place where the concession activity would be exercised and thus the establishment at Székesfehérvár did not constitute a breach of the Concession Contract.⁵⁴⁵
457. In any event, Claimant submits that such a breach would not justify termination of the Concession Contract with immediate effect pursuant to Clause 15.2.1.1. Claimant refers to the opinion of its expert Dr. Tausz that the list in Clause 15.2.1 is exhaustive and does not include the failure to establish the Concession Company within the territory of the settlement where the concession activity is to be exercised. Claimant further argues that the immediate termination of the Concession Contract “*for an alleged failure to comply with a registration requirement, was grossly disproportionate*” and refers to Dr. Tausz’s statement that “[i]t would be highly unreasonable to frustrate an investment of this magnitude due to such an administrative formality, [as] moving the registered seat of a Hungarian company from one city to another is a very simple, formal procedure which can be accomplished within a few weeks.”⁵⁴⁶

(iii) The Suretyship Provided by Mr. Lauder Complied with the Terms of the Concession Contract

458. Finally, Claimant refers to Respondent’s allegation that the Suretyship provided by Mr. Lauder did not comply with the terms of Clause 12.1 of the Concession Contract. Clause 12.1 provides:

“As security for any of its payment obligations arising from this Contract, the Concession Receiver shall ensure from January 1, 2010 for the full concession period without interruption a bank guarantee, security deposit or cash surety.”

⁵⁴⁴ Reply, ¶ 272; Tausz II, ¶ 2.2.2.13.

⁵⁴⁵ Reply, ¶¶ 273-275; 431.

⁵⁴⁶ Reply, ¶¶ 276-277; Tausz II, ¶ 2.2.2.15.

459. In response to Respondent's assertion that the Suretyship did not comply with the requirements because it was limited in time and in value, Claimant argues that this interpretation contradicts the plain language of the Concession Contract. Claimant submits that Clause 12.1 offers the concession receiver the choice of three types of acceptable security; however, Respondent's interpretation of the term "*without interruption*" in Clause 12.1 fails to take into account the terms of Clause 12 as a whole. Claimant refers to the use of the same term in Clause 12.2.2, pursuant to which "[t]he bank guarantee shall be provided without interruption, i.e. on an annual basis."
460. Claimant is of the view that the meaning of the term "*without interruption*" provided in Clause 12.2.2 must apply with equal force to all three types of security.⁵⁴⁷ Claimant refers to its expert Prof. Kisfaludi who noted in his expert opinion that "[i]t would result in an insolvable contradiction to interpret section 12.1 of the Concession Contract as requiring an unlimited guarantee in terms of time and amount, when the next section on bank guarantee [...] specifies both a time limit and minimum amount."⁵⁴⁸
461. Claimant argues that KC Bidding was entitled to change the type of security, provided that valid security was in place as of 1 January 2011. As Mr. Lauder's Suretyship only expired on 31 March 2011, it was still valid at the time of Respondent's termination of the Concession Contract.⁵⁴⁹
462. With regard to Respondent's argument that the limitation of the amount was an "*unacceptable condition of the Surety*," Claimant contends that Respondent again fails to interpret Clause 12.1 in the context of Clause 12 as a whole and refers to Clause 12.2.3, according to which the amount of the bank guarantee shall equal the concession fee payable by the Concession Receiver for the given years. According to Claimant, this provision confirms that Clause 12.1 does not require any of the three types of security to be unlimited in amount.⁵⁵⁰
463. Finally, Claimant asserts that Respondent, on at least two occasions prior to the termination, positively assured Claimant of the validity of the Suretyship:⁵⁵¹ On 9 December 2009, Mr. Árvai wrote in his letter to Dr. Bárd that "*the suretyship is acceptable and no objections have been raised according to paragraph 12.4 of the concession agree-*

⁵⁴⁷ Reply, ¶¶ 286-288, 433.

⁵⁴⁸ Reply, ¶ 288; Kisfaludi, ¶ 39.

⁵⁴⁹ Reply, ¶¶ 291, 434.

⁵⁵⁰ Reply, ¶¶ 292-293.

⁵⁵¹ Memorial, ¶¶ 480-481; Reply, ¶ 435.

ment.”⁵⁵² By letter of 5 March 2010, Dr. Oszkó also confirmed to KB Bidding that there were “no reservations regarding the implementation of the terms of this [concession] agreement.”⁵⁵³ Claimant refers to Dr. Tausz’s statement that on the basis of these letters, “it is reasonable to say that the State of Hungary, the creditor, accepted the Suretyship Declaration” and that the suretyship was thus valid under Hungarian law.⁵⁵⁴

464. Claimant argues that if even if the Suretyship was “not technically in compliance with the terms of the Concession Contract,” the two letters constitute either a waiver by Respondent of the exercise of its rights based on a breach of those terms or a modification of the Concession Contract itself.⁵⁵⁵ Claimant is of the view that, having accepted the validity of Mr. Lauder’s Suretyship, Respondent was obliged under Hungarian law to act in good faith and to cooperate. Claimant refers to the expert opinion of Prof. Kisfaludi who stated that the obligation to cooperate “required the Respondent to notify the other party, KC Bidding Kft., of the breach and to give it sufficient time to rectify the breach.”⁵⁵⁶

b) Respondent Is Not Entitled to Rely upon Grounds of Termination the Causes of Which Were its Own Failures

465. Claimant submits that, even if Respondent’s termination of the Concession Contract were genuinely based on the purported reasons, as a corollary of the principle that *nul lus commodum capere potest de sua injuria propria* (no man can take advantage of his own wrong), the fact that Respondent’s own conduct gave rise to the existence of such purported reasons means that its reliance upon them cannot be in good faith.⁵⁵⁷
466. Claimant refers to the fact that (i) the MNV attacked the valuation of its own valuator Perfekting in arguing for the invalidity of the Land Swap Agreement; (ii) ITD Hungary relied on Respondent’s own investigation of the Land Swap Agreement, which arose exclusively out of the dispute that had arisen between Respondent’s Water Authority and Construction Authority, to justify its refusal to sign the incentive agreement; and (iii) Respondent concluded that KC Bidding did not hold “the legitimate right to possession of the real properties of establishment of the Casino [...] and the right to en-

⁵⁵² Exhibit C-206.

⁵⁵³ Exhibit C-205.

⁵⁵⁴ Memorial, ¶ 480; Tausz I, ¶ 5.3.3.3.

⁵⁵⁵ Reply, ¶ 294, Kisfaludi, ¶ 54.

⁵⁵⁶ Reply, ¶ 296, Kisfaludi, ¶ 57.

⁵⁵⁷ Memorial, ¶ 467.

croachment of the necessary superstructures within the settlement where the activity subject to [the] concession is exercised”⁵⁵⁸ on the basis that Mr. Blum’s legal title over the Sukoró Site had not been registered. Claimant’s expert witness Dr. Tausz describes this situation as having arisen out of the “*gross incompetence by the collective State authorities*” in connection with the Land Swap Agreement.⁵⁵⁹

467. Claimant submits that Respondent relied upon “*its own multiple failures,*”⁵⁶⁰ namely the lack of registration and the failure of the tract formation procedure, to prevent KC Bidding from satisfying the requirements of the Concession Contract, and asserts that, as a matter of Hungarian law, this is not permissible under the principle *nemo suam turpitudinem allegans auditur*.⁵⁶¹

468. Claimant refers to the opinion of its expert Prof. Kisfaludi who opines:

*“Taking into consideration that the cause of the failure of the tract formation was the breach of law by the Respondent’s own construction authority (as specified by the public prosecutor’s protest), the Respondent’s challenge to Mr. Blum’s ‘right to build’ was clearly based upon its own failure. This is not acceptable in civil law relationships. Section 4(4) of the Hungarian Civil Code prohibits using one’s own culpable acts as a basis for acquiring benefits.”*⁵⁶²

469. Claimant further quotes Prof. Kisfaludi’s statement that Respondent was not entitled to rely upon grounds for termination the causes of which were its own failures:

*“[E]ven if it is assumed that the absence of registration of Mr. Blum’s ownership concerning the Sukoró site had been in itself a good reason for termination of the Concession Contract (which it was not), the Respondent organs’ own failures in the registration process deprived the Respondent from using the missing registration as a basis for termination of the Concession Contract.”*⁵⁶³

470. Claimant finally refers to Prof. Kisfaludi’s conclusion that, treating Respondent as a “*single unit, embracing all the organs and organisations which were established and*

⁵⁵⁸ Clause 9.3 of the Concession Contract. **Exhibit C-1.**

⁵⁵⁹ Memorial, ¶ 474; Tausz I, ¶ 3.1.4.

⁵⁶⁰ Reply, ¶ 280.

⁵⁶¹ Reply, ¶¶ 279-280.

⁵⁶² Reply, ¶ 280; Kisfaludi, ¶ 64.

⁵⁶³ Reply, ¶ 281; Kisfaludi, ¶ 71.

maintained by the Respondent,” Respondent cannot rely upon its own failures to justify the termination of the Concession Contract.⁵⁶⁴

2. Summary of Respondent’s Position

a) The Concession Contract Was Terminated in Accordance with its Terms and Hungarian Law

471. Respondent submits that it terminated the Concession Contract with immediate effect on the basis of three independent grounds, all of which constitute valid grounds for termination under Hungarian law.⁵⁶⁵

(i) SDI Europe Did Not Have the Legitimate Right of Possession of and the Right to Build on the Sukoró Site

472. Respondent first submits that KC Bidding failed to certify that SDI Europe had the “*legitimate right of possession*” and the “*right of encroachment*” as required under Clause 9.3 of the Concession Contract.

473. Respondent submits that Clause 15.2.1.1 provides that failure to secure a Project site in accordance with Clause 9.3 entitles the State to terminate the Concession Contract with immediate effect.⁵⁶⁶

474. Respondent argues that the sequence of events that preceded KC Bidding’s notification of the Ministry of National Economy that SDI Europe had allegedly acquired lawful possession of the Sukoró Site demonstrates that possession of the land was established at the last minute in order to present the appearance of formal compliance with Clause 9.3 of the Concession Contract. Respondent argues that from October 2009 and throughout 2010, the Project Sponsors understood that they needed to secure an alternative site for the Project and made some effort to do so; however, KC Bidding failed to secure an alternative location.⁵⁶⁷ In this regard, Respondent refers to the following events:

- On 20 December 2010, ten days before the deadline to secure a Project site, KC Bidding and SDI Europe concluded the Assignment Agreement which purported to transfer to SDI Europe KC Bidding’s rights to the Leased Real Properties as de-

⁵⁶⁴ Reply, ¶ 282; Kisfaludi, ¶ 72.

⁵⁶⁵ Counter-Memorial, ¶ 363.

⁵⁶⁶ Counter-Memorial, ¶ 365.

⁵⁶⁷ Counter-Memorial, ¶ 367.

fined in the Lease Agreement and, in particular, the “*right of possession and the building (encroachment) rights.*”⁵⁶⁸

- On 21 December 2010, KC Bidding and SDI Europe concluded a handover protocol, purporting to transfer possession of the Leased Real Properties to the Concession Company.⁵⁶⁹
 - On 21 December 2010, KC Bidding sought to certify to the Ministry of National Economy that SDI Europe had acquired lawful possession of, and the right to build on, the real properties at Sukoró, and that KC Bidding had accordingly complied with its contractual obligations under Clause 9.3 of the Concession Contract.⁵⁷⁰
475. Respondent refers to the witness statement of Dr. Róza Nagy, in which she explains that KC Bidding’s letter of 21 December 2010 was reviewed by the Ministry of National Economy’s external legal counsel who determined that SDI Europe could not have acquired legitimate possession of, or the right to build on, the Sukoró Site, prompting the Ministry’s decision to terminate the Concession Contract.⁵⁷¹
476. Respondent relies on the opinion of its expert Prof. Király who explains that the requirement of “*legitimate possession*” in the context of Clause 9.3 of the Concession Contract is two-fold: (i) the Concession Contract must be in actual possession of the Project site, and (ii) this possession must be based on a valid legal title.⁵⁷² Respondent claims that the chain of transfer of possession is fundamentally flawed because the first link in the chain is missing: Mr. Blum never held (and therefore could never have effectively transferred) a valid legal title to the Sukoró Site.⁵⁷³
477. Respondent argues that Mr. Blum could not have acquired valid legal title to the Sukoró Site because that legal title derived from the Land Swap Agreement. This Agreement was, as now confirmed by the *Curia*, null and void *ab initio*, which, Respondent submits, means that no rights or obligations could derive from that contract.⁵⁷⁴
478. Respondent argues that there was no consensual transfer of possession independent of the Land Swap Agreement. It refers to the expert opinion of Prof. Király that the hand-

⁵⁶⁸ **Exhibit C-11.**

⁵⁶⁹ **Exhibit R-104.**

⁵⁷⁰ Counter-Memorial, ¶ 367; Rejoinder, ¶ 281; **Exhibit C-203.**

⁵⁷¹ Rejoinder, ¶ 281; Nagy, ¶ 40.

⁵⁷² Counter-Memorial, ¶ 369; Király I, ¶ 6.

⁵⁷³ Counter-Memorial, ¶ 370.

⁵⁷⁴ Counter-Memorial, ¶¶ 371, 286-303.

ing over recorded in the Handover Protocol “*took place on the basis of the Land Swap Agreement*” and further that the Registration Authorization was issued in order to “*carry out the Land Swap Agreement.*”⁵⁷⁵

479. Respondent further asserts that no consensual transfer of ownership took place, even if the Land Swap Agreement had been valid, because the Registration Authorization could not create ownership rights without the actual registration.⁵⁷⁶

480. As regards the “*right to encroachment,*” Respondent again refers to Prof. Király, who explained that “*this right corresponds to the right to build, which is held exclusively by the owner of the land, who alone may transfer this right to third parties.*”⁵⁷⁷

481. Respondent submits that it is incorrect for Claimant’s expert Dr. Tausz to state that the rights relating to the Sukoró Site granted pursuant to Section III.3 of the Land Swap Agreement include the right to build.⁵⁷⁸

482. Respondent maintains that Mr. Blum never acquired a right of ownership. His alleged right to build therefore had to be otherwise transferred by the owner of the land. Furthermore, the Land Swap Agreement and the Handover Protocol did not grant Mr. Blum any right to build on the Sukoró Site.⁵⁷⁹

- Section III.3 of the Land Swap Agreement did not transfer any right to build to Mr. Blum. Section III. 3 of the Land Swap Agreement provides: “*Starting from the date of cession, the Parties shall be entitled to the rights and benefits related to the property – acquired on the basis of the present agreement – and they shall bear all burdens as well as the damage and loss risks related to the property.*”⁵⁸⁰ First, the acquisition of any “*rights related to the property*” by Mr. Blum could have occurred only after the registration of his title, which never happened. More importantly, Mr. Blum could not and did not acquire any rights based on an agreement that is, as confirmed by the *Curia*, null and void.
- In addition, the Handover Protocol did not transfer to Mr. Blum the State’s right to build. As is plain from the language of the Handover Protocol, it did not purport to

⁵⁷⁵ Rejoinder, ¶ 244; Király II, ¶¶ 16-25.

⁵⁷⁶ Rejoinder, ¶ 245.

⁵⁷⁷ Counter-Memorial, ¶ 373; Király I, ¶¶ 19-24.

⁵⁷⁸ Counter-Memorial, ¶¶ 374-375; Tausz I, ¶ 5.3.4.6.

⁵⁷⁹ Counter-Memorial, ¶ 375.

⁵⁸⁰ **Exhibit C-41.**

transfer a right to build but merely purported to transfer possession, which means the right to enjoy the property “*as is.*”

- In any event, Mr. Blum cannot rely on the Land Swap Agreement to assert any right to build because the Land Swap Agreement was declared null and void, thus rendering the Handover Protocol, which was concluded on the basis of the Land Swap Agreement, also null and void.

483. In its Post-Hearing Brief, Respondent submits that Hungary considered the Land Swap Agreement to be null and void *ab initio* and asserts that it communicated such view to Mr. Blum as early as in November 2009.⁵⁸¹

484. In response to Claimant’s submission that the Termination Letter does not refer to the absolute nullity of the Land Swap Agreement, Respondent submits that the nullity was one of the reasons underlying Respondent’s position in the Termination Letter and that Hungarian law does not require that the justification of a termination ground be expressly stated upon termination, as long as the termination ground exists.⁵⁸²

485. Respondent further contends that, even if the Land Swap Agreement had been valid, the Registration Authorization in itself could not have created ownership rights in the absence of actual registration. Respondent submits that this was reflected in the drafting of the Termination Letter by way of reference to Article 97(2) of the Hungarian Civil Code.⁵⁸³

486. Respondent concludes that Mr. Blum never acquired the right to build on the Sukoró Site and therefore, on 1 January 2011, SDI Europe did not have the right to build on that site as required by Clause 9.3.⁵⁸⁴ In Respondent’s view, Claimant was fully aware that it had not secured the Sukoró Site, as Mr. Langhammer confirmed during the Hearing that Claimant had asked for an extension in October 2010 because he knew that Claimant, “*come 1 January 2011,*” would not otherwise “*have possession of the site.*”⁵⁸⁵

⁵⁸¹ Respondent’s Post-Hearing Brief, ¶ 233.

⁵⁸² Respondent’s Post-Hearing Brief, ¶ 235.

⁵⁸³ Respondent’s Post-Hearing Brief, ¶ 235.

⁵⁸⁴ Counter-Memorial, ¶ 376.

⁵⁸⁵ Respondent’s Post-Hearing Brief, ¶ 236; Transcript, p. 964, lines 8-16.

487. Respondent submits that KC Bidding failed to secure a Project site in Sukoró for reasons unrelated to Respondent and claims that the Project Sponsors were aware from the outset of the “*likely unavailability*” of the Sukoró settlement.⁵⁸⁶
488. Respondent also refers to the fact that, during the negotiation of the Concession Contract, the Ministry of Finance agreed with KC Bidding that the Concession Contract should be amended so as to allow for the Project to be implemented in any one of 133 settlements in Central Transdanubia. The Sukoró Site was initially the sole Project site, but both parties agreed that the site could be selected from any location within the 133 settlements listed in the Tender and in Annex 1 to the Concession Contract. Respondent stresses that the only mention of the Sukoró Site in the Concession Contract is contained in Annex 1. Respondent submits that the evidence shows that the Concession Contract was signed on the mutual understanding that, due to the uncertainties surrounding the Land Swap Agreement, the Project would “*likely not proceed in Sukoró.*”⁵⁸⁷
489. Respondent concludes that it did not procure the grounds for termination of the Concession Contract. Specifically, it did not interfere with KC Bidding’s search for an alternative settlement. Respondent submits that, for reasons unknown to it, KC Bidding decided to resort to the Sukoró Site, which KC Bidding knew was not available for the Project.⁵⁸⁸

(ii) KC Bidding Failed to Establish the Concession Company within the Same Administrative Territory as the Project Site

490. Secondly, Respondent submits that KC Bidding was contractually bound under Clause 7.1.2 of the Concession Contract to establish the headquarters of the Concession Company “*within the territory of the settlement where the activity subject to concession is exercised,*” such obligation continuing “*at the time of establishing and throughout the concession period as well.*”⁵⁸⁹
491. Respondent submits that KC Bidding purported to certify legitimate possession of a Project site in Sukoró even though the Concession Company, SDI Europe, had been and remained established in Székesfehérvár.⁵⁹⁰ Respondent emphasizes that, by locat-

⁵⁸⁶ Rejoinder, ¶ 301.

⁵⁸⁷ Rejoinder, ¶ 305.

⁵⁸⁸ Rejoinder, ¶ 321.

⁵⁸⁹ Counter-Memorial, ¶ 378.

⁵⁹⁰ Counter-Memorial, ¶ 379.

ing its headquarters in Székesfehérvár, the Concession Company had, on the basis of Clauses 7.1 and 7.1.2 of the Concession Contract, designated Székesfehérvár as the settlement where the concession activity would be exercised.⁵⁹¹ According to Respondent, KC Bidding thus failed to certify legitimate possession of a Project Site located within the same territory as the Concession Company (*i.e.*, at Székesfehérvár), which entitled Respondent to terminate the Concession Contract pursuant to Clause 15.2.1.1.⁵⁹²

492. In reference to Claimant's argument that the seat of the Concession Company could be located in any of the settlements listed in Annex 1 of the Concession Contract, Respondent maintains that Clause 7.1.2 requires that the Concession Company be located within the "*same territory*" as the Project site that KC Bidding had chosen from the list in Annex 1 of the Concession Contract.⁵⁹³
493. Respondent also refers to Claimant's argument that Respondent's interpretation of the Contract would have meant that KC Bidding was required to determine the location of the exercise of the activity subject to concession within 90 days of signature of the Concession Contract. Respondent contends that Claimant's understanding is wrong in this regard; KC Bidding could subsequently have chosen to locate the Project in another location, which would have required it to change the seat of the Concession Company.⁵⁹⁴ In Respondent's view, it was logical to consider that by locating and maintaining its headquarters in Székesfehérvár, KC Bidding had designated Székesfehérvár as the Project location.⁵⁹⁵
494. Respondent submits that KC Bidding's failure to establish the Concession Company "*within the territory of the settlement where the activity subject to concession is exercised*" justified the termination of the Concession Contract.⁵⁹⁶
495. Respondent recognizes that failing to establish the Concession Company within the same territory as the Project site is a formal ground for termination, and submits that it was included in the Termination Letter as a "*matter of proper and cautious legal prac-*

⁵⁹¹ Rejoinder, ¶ 233.

⁵⁹² Counter-Memorial, ¶ 379.

⁵⁹³ Counter-Memorial, ¶ 380.

⁵⁹⁴ Rejoinder, ¶¶ 296-297.

⁵⁹⁵ Rejoinder, ¶ 297.

⁵⁹⁶ Counter-Memorial, ¶ 381.

tice.” Respondent further submits that the Concession Company could have transferred its headquarters to Sukoró, but it failed to do so.⁵⁹⁷

(iii) The Suretyship Provided by Mr. Lauder Did Not Comply with the Terms of the Concession Contract

496. Finally, Respondent submits that KC Bidding was contractually bound under Clause 12.1 of the Concession Contract to provide financial security on an annual basis throughout the concession period to guarantee any of its payment obligations under the Concession Contract. Respondent relies on its expert Prof. Király’s confirmation that any security provided under Clause 12.1 must be “*unlimited in its amount, i.e., covers each and any payment obligation of the Concessionaire that may arise from the Concession Contract during the concession*” and “*uninterrupted*” throughout the concession period.⁵⁹⁸
497. Respondent submits that the Suretyship provided by Mr. Lauder on behalf of KC Bidding was limited in time and in value: It was valid until 31 March 2011 and capped at HUF 936 Million. Respondent submits that it was therefore entitled to terminate the Concession Contract with immediate effect pursuant to Clause 15.2.1.22.⁵⁹⁹
498. Respondent observes that Claimant does not explicitly deny that Mr. Lauder’s Suretyship did not comply with the requirements under Clause 12.1 of the Concession Contract. Rather, Claimant asserts that “*Respondent twice positively assured Claimant of the validity of Mr. Lauder’s suretyship,*” *i.e.*, in the letters of Mr. Árvai and Dr. Oszkó dated 9 December 2009 and 5 March 2010, respectively, and was therefore precluded from referring to KC Bidding’s violation of Clause 12.1 of the Concession Contract as a ground for termination. Respondent contends that these letters provide no such assurance.⁶⁰⁰
499. In his letter dated 9 December 2009, Mr. Árvai confirmed that “*no objection has been raised with respect to the identity of the guarantor*” and that the suretyship therefore “*meets the requirements under paragraph 12.4 of the Concession Contract.*”⁶⁰¹ Respondent argues that Claimant’s translation of this letter is inaccurate: Mr. Árvai did not confirm that “*the suretyship was acceptable*”; he simply confirmed that Mr. Lauder

⁵⁹⁷ Respondent’s Post-Hearing Brief, ¶ 229.

⁵⁹⁸ Counter-Memorial, ¶ 382; Király I, ¶¶ 72-87.

⁵⁹⁹ Counter-Memorial, ¶ 384.

⁶⁰⁰ Counter-Memorial, ¶ 385.

⁶⁰¹ Counter-Memorial, ¶ 386 (emphasis in Respondent’s quotation of the original); **Exhibit R-79**.

was an acceptable guarantor within the meaning of Clause 12.4 of the Concession Contract, without commenting on the validity of the Suretyship in view of the requirements of Clause 12.1 concerning the term and the value of the Suretyship.⁶⁰² Respondent submits that the identity of the guarantor is unrelated to the basis for termination articulated in the Termination Letter (that the Suretyship provided by Mr. Lauder was limited in time and in value).

500. Likewise, Respondent submits that Claimant's translation of Dr. Oszkó's letter of 5 March 2010 is inaccurate; Dr. Oszkó confirmed that "[n]o objections have been raised with regard to the performance of these contractual obligations as yet."⁶⁰³ Respondent maintains that this letter does not address the compliance of the Suretyship with the relevant requirements under Clause 12.1 of the Concession Contract, but rather the contractual obligations specifically referred to in Mr. Benkley's letter, including the obligations under Clause 12.4 of the Concession Contract concerning the identity of the guarantor. Respondent submits that it therefore cannot be understood as a broad assurance as to the validity of the Suretyship.⁶⁰⁴

501. Respondent submits that for these reasons, the three grounds for termination invoked in Hungary's Termination Letter are valid under the terms of the Concession Contract and Hungarian law and therefore justify the termination of the Concession Contract.⁶⁰⁵

502. Respondent refers to Claimant's argument that, even if the termination were lawful under Hungarian law, Hungary failed to give KC Bidding advance notice of its intention to terminate and provide an opportunity to cure any alleged breaches, or to otherwise agree to KC Bidding's request for an extension of the deadline under Clause 9.3.⁶⁰⁶ Respondent submits that nothing in the Concession Contract or under Hungarian law imposes on the State the obligation to give the investor advance notice of any termination.

b) Respondent Was Not Precluded From Relying on the Fact that Mr. Blum Was Not Registered as the Owner of the Leased Real Properties

503. With regard to Claimant's argument that the *nemo auditur propriam turpitudinem allegans* principle prevents Respondent from relying on the lack of registration as a ter-

⁶⁰² Counter-Memorial, ¶ 386.

⁶⁰³ **Exhibit R-82.**

⁶⁰⁴ Counter-Memorial, ¶ 387.

⁶⁰⁵ Counter-Memorial, ¶ 389.

⁶⁰⁶ Counter-Memorial, ¶ 390.

mination ground, Respondent submits that Claimant has not considered the conditions that must be fulfilled in order for the *nemo auditur* principle to apply to the current case, namely that a party has to rely on its own culpable act with the aim of obtaining advantages.⁶⁰⁷

504. Respondent refers to the opinion of its expert Prof. Varga who explains that, under Hungarian law, the crucial element to be determined is whether the act committed qualifies as a “*culpable act*”:

*“At the heart of the nemo auditor principle, however, lies the notion of a culpable act, including one’s omissions, breaches of contract, late performance, criminal acts etc. All these actions have in common that they do not meet the requirement established in the first sentence of Section 4(4) of the Hungarian Civil Code that is they cannot be considered reasonable or to be as it can be expected under the given circumstances.”*⁶⁰⁸

505. Respondent cites Prof. Varga’s statement that “*Respondent is not precluded from relying on the fact that Mr. Blum did not meet the requirement to have legitimate possession of, and the right to build on the Sukoró plots,*” notably because Respondent’s conduct in the tract formation process does not qualify as culpable conduct within the meaning of Section 4(4) of the Hungarian Civil Code.⁶⁰⁹ Respondent refers to Prof. Varga’s reasoning in this regard:

*“According to established case-law developed in connection with damages claims initiated against public authorities, only a flagrantly flawed interpretation and application of the laws in force can amount to the qualification of a culpable act.”*⁶¹⁰

506. Respondent concludes that the tract formation process “*involved highly complicated matters of Hungarian land law*”; therefore, Respondent’s conduct cannot be qualified as culpable, which renders the *nemo auditur* principle inapplicable.⁶¹¹

507. Respondent submits that, in any event, the need for the tract formation procedure derived from the Land Swap Agreement and as the *Curia* confirmed that the Land Swap

⁶⁰⁷ Rejoinder, ¶ 249.

⁶⁰⁸ Rejoinder, ¶ 250 (emphasis in Respondent’s quotation of the original); Varga II, ¶ 13.

⁶⁰⁹ Rejoinder, ¶ 251; Varga II, ¶ 15.

⁶¹⁰ Rejoinder, ¶ 251 (emphasis in Respondent’s quotation of the original); Varga II, ¶ 20.

⁶¹¹ Rejoinder, ¶ 252.

Agreement was null and void *ab initio*, any issue arising out of the tract formation procedure is moot.⁶¹²

3. The Tribunal's Analysis

a) Preliminary Observations

508. The Tribunal makes the following preliminary observations: First, a lawsuit is pending before the Hungarian courts regarding the legality of Respondent's termination of the Concession Contract.⁶¹³ To the Tribunal's knowledge, no decision has yet been rendered. Second, the validity of the Land Swap Agreement was similarly the subject of court proceedings in Hungary, which resulted in a final decision of the *Curia*, rendered on 13 November 2012, holding that the Land Swap Agreement was null and void.⁶¹⁴
509. The Tribunal notes that there is no dispute between the Parties that, while the decision of the *Curia* has *res judicata* effect as a matter of Hungarian law, it does not have such effect on the international plane and does not bind this Tribunal.⁶¹⁵ Accordingly, the Tribunal will, in its own right, decide the issues in light of the evidence before it, giving due consideration to the *Curia* decision as evidence of Hungarian law.
510. The Tribunal notes that, in its Reply, Claimant took the view that the "*the Curia decision [...] cannot be viewed as credible.*"⁶¹⁶ First, Claimant submitted that one of the five judges who sat on the panel during the hearing on 13 November 2012 had only been appointed to the case the previous day and therefore had not had an opportunity to examine the file.⁶¹⁷ Second, in Claimant's view, the *Curia* based its decision on reasons that "*had never been addressed by the parties throughout the life of the proceeding, [and] Mr. Blum was accorded no opportunity to submit his views or submissions on them.*" According to Claimant, the *Curia*'s decision therefore "*violate[d] basic norms of due process and equality of arms at international law.*"⁶¹⁸ In its Post-Hearing Brief, Claimant maintains its position that the *Curia* determined the invalidity of the Land Swap Agreement "*on the basis of entirely different reasons,*"⁶¹⁹ but Claimant no longer refers to the replacement judge; it also no longer draws the conclusion that the

⁶¹² Counter-Memorial, ¶ 431.

⁶¹³ Reply, ¶ 117; Counter-Memorial, ¶ 284; **Exhibit R-121**; Respondent's Post-Hearing Brief, ¶ 240.

⁶¹⁴ **Exhibit R-131**.

⁶¹⁵ Reply, ¶ 454; Respondent's Post-Hearing Brief, ¶¶ 240-241.

⁶¹⁶ Reply, ¶ 350.

⁶¹⁷ Reply, ¶¶ 335, 336.

⁶¹⁸ Reply, ¶ 349.

⁶¹⁹ Claimant's Post-Hearing Brief, ¶ 277.

Curia's decision is thus flawed. The Tribunal notes that none of these issues were raised by Claimant during the Hearing. In the written pleadings, they have never been a primary argument or focus of Claimant's contentions. In fact, the Tribunal cannot address these issues in any detail because they received only conclusory treatment and scant attention from the Parties. In any event, they have not been adequately evidenced to credit them. The Tribunal also notes that the main basis for the *Curia*'s decision, *i.e.*, that the development of the M4 motorway required the acquisition of only a small part of the land that was swapped for the Sukoró land, had already been raised as an argument in the first instance, as evidenced by the discussion of this issue in the decision of the Fejér County Court.⁶²⁰ Under these circumstances, the Tribunal cannot find any procedural unfairness in the conduct of the legal proceedings before the Hungarian courts.

b) The Termination Grounds Invoked by Respondent

511. In its Termination Letter, Respondent states that it terminated the Concession Contract with immediate effect pursuant to the provisions of Clause 15.2.1, and specifically based on Clauses 15.2.1.1 and 15.2.1.22. Respondent listed three termination grounds.
512. First, Respondent stated that, pursuant to Clause 7.1.2 of the Concession Contract, the headquarters of the Concession Company was required to be located where the concession activity would be exercised. As SDI Europe had its seat in Székesfehérvár at the time that the contractual deadline for acquiring both the legitimate right to possession and the right to build expired, Claimant would have needed to secure a Project site at Székesfehérvár, not at Sukoró, in order to comply with Clause 9.3 of the Concession Contract.
513. Second, Respondent stated that, even if Claimant had designated Sukoró as the location for the concession activity to be exercised, Clause 9.3 was not complied with because Claimant had not acquired the legitimate right to possession of, and the right to build on, the Leased Real Properties. Respondent based that conclusion on the fact that, according to the deeds of ownership, the owner of the Sukoró Site was the Hungarian State and not Mr. Blum; accordingly, Mr. Blum could not have entered into a valid agreement to share ownership with KC Bidding and, in turn, KC Bidding could not have concluded a valid agreement capable of transferring legitimate ownership and building rights with regard to the Leased Real Properties to SDI Europe.

⁶²⁰ Exhibit R-127, ¶¶ 553 *et seq.*

514. Third, Respondent based the termination of the Concession Contract on the ground that the Suretyship provided by Mr. Lauder did not comply with Clause 12.1 of the Concession Contract because it was not sufficient in time and value.

515. During the proceedings it became clear to the Tribunal that the second ground constitutes Respondent's main ground for terminating the Concession Contract, whereas the other two grounds may be considered additional, more formalistic grounds.⁶²¹ The Tribunal will first address these two additional grounds before turning to its analysis of the main termination ground.

(i) Respondent's First Termination Ground: SDI Europe Did Not Have Legitimate Possession of, and the Right to Build on, a Site in Székesfehérvár

516. Respondent reasoned in its Termination Letter that, as the Concession Company had been established in Székesfehérvár, Claimant must have designated Székesfehérvár as the settlement where the concession activity was to be exercised. As Claimant ultimately, in its letter of 21 December 2010, designated a location as the Project site that was not based in Székesfehérvár, Respondent submits that Claimant failed to comply with Clause 9.3 of the Concession Contract. The Tribunal notes that Respondent did not argue in the Termination Letter that Claimant failed to establish the Concession Company within the same territory as the designated Project site, *i.e.*, at Sukoró, which would have qualified as a breach of Clause 7.1.2 only, but rather that Claimant, by locating the headquarters of SDI Europe at Székesfehérvár, designated Székesfehérvár as the location of the Project site and therefore did not comply with Clauses 9.3 and 7.1.2, since it did not acquire a site in Székesfehérvár.

517. While recognizing that the headquarters of SDI Europe was indeed located at Székesfehérvár and not at Sukoró both when the deadline set out in Clause 9.3 expired on 1 January 2011 and when the Concession Contract was terminated on 10 January 2011, the Tribunal does not agree with Respondent's reasoning in its Termination Letter that this necessarily leads to the conclusion that Claimant had designated

⁶²¹ As regards the first termination ground, Respondent concedes in its Reply that Hungary terminated the Concession Contract based on the "*admittedly formal*" ground that Claimant had not certified the legitimate right of possession and the right to build in Székesfehérvár. Reply, ¶ 237. During its Opening Statement at the Hearing, Respondent also refers to this termination ground as "*a formal matter*." Transcript, p. 338, line 18. In its Closing Statement, Respondent calls it a "*technical ground*," but at the same time emphasizes that it is "*a very serious and legally accurate ground for termination of the Concession Contract*." Transcript, p. 2964, lines 5-11. In its Post-Hearing Brief, Respondent again refers to this termination ground as a "*formal ground [...] which was included in the Termination Letter as a matter of proper and cautious legal practice*." Respondent's Post-Hearing Brief, ¶ 229.

Székesfehérvár as the location for its Project. On the contrary, Claimant, in its letter to Respondent of 21 December 2010, clearly stated that the Leased Real Properties at Sukoró were to be the location for the “*establishment of the Casino and for exercising of the activity defined therein.*”⁶²² The Tribunal therefore concludes that Claimant did not breach Clause 9.3 in connection with Clause 7.1.2 of the Concession Contract by establishing the Concession Company at Székesfehérvár and then certifying a Project site that was not located at Székesfehérvár.

518. There nevertheless remains the fact that SDI Europe did not have its headquarters within the same territory as the designated Project site, *i.e.*, at Sukoró. The Tribunal does not consider it necessary to analyze whether this qualifies as a breach of Clause 7.1.2 of the Concession Contract because, in the Tribunal’s view, even if that were the case, this breach would not constitute a ground for terminating the Concession Contract with immediate effect pursuant to Clause 15.2.1. The failure to establish the Concession Company within the same territory as the certified Project site does not qualify as a breach of Clause 9.3 in conjunction with Clause 7.1.2, but as a breach of Clause 7.1.2 only. However, such breach is not included within the grounds for termination listed in Clause 15.2.1, which has been invoked by Respondent in its Termination Letter. Thus, the Contract itself does not provide for termination on this basis.

519. In addition, Respondent does not contest that Claimant would have been able to change the headquarters of the Concession Company to Sukoró easily and within a relatively short period of time. Although Respondent may not have been expressly obliged to give Claimant the opportunity to remedy any contractual breach before exercising its termination right, the Tribunal is of the view that it was unreasonable for Respondent to terminate the Concession Contract relating to such a major Project without notice and an opportunity to remedy the breach, for what is – in the Tribunal’s view and as acknowledged by Respondent⁶²³ – an administrative formality. The Tribunal therefore finds that the fact that the Concession Company did not have its seat in Sukoró did not justify, in itself, the immediate termination of the Concession Contract.

(ii) Respondent’s Third Termination Ground: Mr. Lauder’s Suretyship Was Limited in Time and Value

520. With regard to the Suretyship that Mr. Lauder provided to Respondent, the Tribunal notes that the Suretyship is dated 12 November 2009, which means that Respondent

⁶²² Exhibit C-203.

⁶²³ See footnote 621.

was aware of its content for more than a year before it terminated the Concession Contract. The record does not show that, during this time period, Respondent ever voiced any objections regarding the limited time or value of the Suretyship vis-à-vis the Project Sponsors.

521. Respondent replied to Claimant's submission of the form of the Suretyship on two occasions, once by letter from Mr. Árvai dated 9 December 2009 and again by letter from Dr. Oszkó dated 5 March 2010. The Parties have submitted different English translations of these letters. With regard to Mr. Árvai's letter, Claimant's translation reads in its relevant part as follows:

*"[T]he suretyship is acceptable and no objections have been raised according to paragraph 12.4 of the concession agreement."*⁶²⁴

Respondent's translation, on the other hand, reads:

*"[T]he suretyship meets the requirements under paragraph 12.4 of the concession agreement [...], no objection has been raised with respect to the identity of the guarantor."*⁶²⁵

Whereas, in the wording of Respondent's translation, Mr. Árvai's assurance appears to be limited to the acceptance of Mr. Lauder as the person providing the Suretyship, Claimant's translation contains no such limitation, but rather indicates a broad assurance that the Suretyship was accepted by the Hungarian State without reservation.

522. Dr. Oszkó's letter of 5 March 2010 was written in response to Mr. Benkley's letter dated 25 January 2010, in which Mr. Benkley stated that KC Bidding had performed all of its obligations stipulated under the Concession Contract including, *inter alia*, the submission of the Suretyship. He requested that the Minister confirm the performance of the obligations. According to Claimant's translation of the letter, Dr. Oszkó replied:

*"There are no reservations regarding the implementation of the terms of this agreement."*⁶²⁶

Respondent's translation of the same part reads:

*"No objections have been raised with regard to the performance of these contractual obligations as yet."*⁶²⁷

⁶²⁴ Exhibit C-206.

⁶²⁵ Exhibit R-79.

⁶²⁶ Exhibit C-205.

Even though the wording of Respondent's translation might suggest that Dr. Oszkó reserved the right to object to Claimant's performance in the future ("*no objections [...] as yet*"), Respondent has not provided any evidence that any objections were ever raised in relation to the Suretyship prior to the Termination Letter.

523. The Tribunal therefore is not required to decide which one of the translations it considers to be more accurate. Both translations of Mr. Árvai's letter of 9 December 2009 show that Respondent was aware of the content of the Suretyship before it was to become effective on 1 January 2010 and did not raise any objections to the limitations in time and value set out in the Suretyship. Further, even if Respondent's translation of Dr. Oszkó's letter of 5 March 2010 were the correct version, the Tribunal is of the view that Respondent would have been under an obligation to inform Claimant, prior to the termination of the Concession Contract, that it had changed its position and no longer considered the Suretyship to be in compliance with Clause 12.1 of the Concession Contract. Nothing in the record indicates that Respondent ever did so.

524. Consequently, the Tribunal finds that the purported non-compliance of the Suretyship with the provisions of Clause 12.1 of the Concession Contract did not justify, in itself, the immediate termination of the Concession Contract pursuant to Clause 15.2.1.22.

(iii) Respondent's Second Termination Ground: SDI Europe Did Not Have Legitimate Possession of, and the Right to Build on, the Leased Real Properties at Sukoró

525. As stated above, the Tribunal considers that Respondent's main ground for terminating the Concession Contract was Claimant's purported failure to comply with Clause 9.3 by not acquiring legitimate possession of, and the right to build on, the Leased Real Properties, which Claimant had designated as the Project site on 21 December 2010.

526. The relevant part of the Termination Letter reads as follows:

"The Hungarian State hereby terminates the Concession Contract as of today's date effective immediately pursuant to the provisions of Clause 15.2.1 and based on Clauses 15.2.1.1 and 15.2.1.22 of the Concession Contract as independent grounds for termination.

[...]

We note that even if the Concession Receiver had designated Sukoró instead of Székesfehérvár as the location for exercising the conces-

⁶²⁷ Exhibit R-82.

sion activity, the documents enclosed by the Concession Receiver did not meet the requirements set out in the contract. Based on the attached title deeds (Appendix 2), it can be established that on 20 December 2010 – as well as currently – the owner of the properties registered in the outskirts of Sukoró under topographical lot numbers 022/7, 022/8, 022/9 and 022/10 was, and still is, the Hungarian State and not Joav Blum.

According to Section 97(2) of the Civil Code, the owner of the relevant land is the sole person who may enter into a valid agreement pertaining to share ownership – granting the ownership of the superstructures to a person different from the owner of the land – thus the null and void contract between KC Bidding Kft. and SDI Europe Kft. is not suitable for supporting the lawful possession and the "right to encroach" of the Concession Company with regard to the Sukoró real properties.”⁶²⁸

527. The Tribunal notes that Respondent did not expressly mention the nullity of the Land Swap Agreement as the basis for the termination in its letter. However, it is clear that Respondent implicitly relied on this basis by reference both to Clause 9.3 of the Concession Contract and to the nullity of the Assignment Agreement between KC Bidding and SDI Europe, which could only derive from the nullity of the Land Swap Agreement.

528. The Tribunal further notes that, even though the Land Swap Agreement had not been declared null and void by the *Curia* at the time of termination, the *Curia* later decided

⁶²⁸ English translation submitted by Respondent as **Exhibit R-111**. The translation submitted by Claimant as **Exhibit C-202** differs in its wording, but not in substance. The same part reads:

“The Hungarian State hereby terminates the Concession Contract as of today’s date effective immediately pursuant to the provisions of Item 15.2.1 and based on Items 15.2.1.1 and 15.2.1.22 of the Concession Contract as independent grounds for termination.

[...]

We hereby inform you that even in the event that the Concession Receiver had specified Sukoró instead of Székesfehérvár as the location for practicing the relevant activity, the documents enclosed by the Concession Receiver would not be considered as proper fulfillment of the contract. As it can be established from the enclosed deed of ownership (Annex 2), the owner of the real properties under Lot Numbers 022/7, 022/8, 022/9 and 022/10 at the outskirts of Sukoró as of December 20, 2010 – and even at present – is the Hungarian State and not Mr. Yoav Blum.

The owner of the relevant land is the sole person who may enter into a valid agreement pertaining to share ownership – granting the ownership of the built structures to a person different from the owner of the land – pursuant to Article 97(2) of the Civil Code, thus the null and void contract between KC Bidding Ltd. and SDI Europe Ltd. is not suitable for supporting the legitimate ownership and "building rights" of the Concession Company with regard to the Sukoró real properties.”

that it was null and void, meaning that, according to the *Curia*'s findings, the Land Swap Agreement was already a nullity when Respondent terminated the Concession Contract.

529. Before considering the reasoning of the *Curia*'s decision, the Tribunal will review the actual status of the real properties in Sukoró as of the date for compliance with Clause 9.3 of the Concession Contract, *i.e.*, 1 January 2011.

- On 30 July 2008, Mr. Blum and the MNV concluded the Land Swap Agreement, relating to the Sukoró Site. As noted above, the Land Swap Agreement was later declared null and void by the *Curia* in its decision of 13 November 2012.
- On 12 December 2008, the MNV issued the Registration Authorization, which provided the MNV's consent to the registration of Mr. Blum's ownership rights over the 20 properties at Sukoró that were to be swapped pursuant to the Land Swap Agreement.
- On 12 February 2009, the MNV and Mr. Blum signed the Handover Protocol, in which the MNV transferred to Mr. Blum possession of the 16 properties that were not affected by the tract formation procedure, among them the four properties serving as the location for the Project (the Leased Real Properties).
- On 8 May 2009, Mr. Blum and KC Bidding entered into the Lease Agreement, which granted KC Bidding a 24-year lease over the four Leased Real Properties on which KC Bidding planned to realize the Project.
- On 13 May 2009, the MNV issued a declaration confirming that Mr. Blum had paid the value difference between the exchanged properties and fulfilled his other obligations arising out of the Land Swap Agreement, and that the properties not affected by the tract formation procedure had been transferred to the possession of Mr. Blum.
- On 12 October 2009, Mr. Blum transferred possession of the four Leased Real Properties to KC Bidding.
- On 20 December 2010, KC Bidding and the Concession Company, SDI Europe, entered into the Assignment Agreement, by which KC Bidding assigned possession and the right to build on the Leased Real Properties to SDI Europe, the Concession Company.

- On 21 December 2010, KC Bidding and SDI Europe signed a handover protocol, by which KC Bidding transferred possession of the Leased Real Properties to SDI Europe.
530. The Tribunal concludes from the foregoing that Mr. Blum acquired possession of the 16 Sukoró properties that were not affected by the tract formation procedure on 12 February 2009 and, with regard to the four Leased Real Properties, transferred such possession to KC Bidding and ultimately SDI Europe, respectively, on 12 October 2009 and 21 December 2010. Consequently, while the Concession Company thus acquired physical possession of the Leased Real Properties, the question that remains to be answered is whether this possession was “*legitimate*” and whether it encompassed the “*right to encroachment*,” as required under Clause 9.3 of the Concession Contract.
531. The Tribunal notes that both Claimant’s and Respondent’s experts congruently stated that “*legitimate*” possession requires that such possession is “*based on a valid legal title*”;⁶²⁹ the necessity of a valid legal title can thus be considered as common ground between the Parties.⁶³⁰
532. In the Termination Letter, Respondent relied on the undisputed fact that Hungary, and not Mr. Blum, was the registered owner of the Sukoró Site and concluded therefrom that Mr. Blum was therefore not in a position to transfer any rights regarding the Leased Real Properties to KC Bidding or SDI Europe. However, the fact that Mr. Blum was never registered as the owner, is not dispositive of the question whether he could transfer “*legitimate*” possession to KC Bidding because even Respondent’s legal experts stated in the course of these proceedings that there are other forms of legal titles for possession. In particular, Prof. Varga acknowledges that “*a sale and purchase contract can [...] serve as a proper legal title for the possession of the thing to be transferred, if it is existent, valid and effective.*”⁶³¹
533. While the Registration Authorization and the Handover Protocol clearly reflect the Parties’ intention consensually to transfer possession of the properties to Mr. Blum, they cannot serve as legal title, as neither of them constitutes a contract in itself. The Registration Authorization only contains the MNV’s unilateral declaration that Mr. Blum, having fulfilled his payment obligation, may be registered in the Land Registry, and the Handover Protocol only records the transfer of possession.

⁶²⁹ Tausz I, ¶ 5.3.1.4; Király I, ¶ 6.

⁶³⁰ Cf. Memorial, ¶ 508; Counter-Memorial, ¶ 369.

⁶³¹ Varga I, ¶ 28.

534. The only contract that may potentially serve as a legal title giving rise to a legitimate right of possession is the Land Swap Agreement. As stated above, the *Curia*, in its decision of 13 November 2012, which is final under Hungarian law, declared the Land Swap Agreement null and void. The decision reads in its relevant part:⁶³²

“Therefore, when examining whether the legal condition is satisfied, it cannot be ignored what proportion of the property is actually needed to implement the construction, and what avenues are open for the Plaintiff to obtain them.

In this case, out of the approximately 182.89 hectare territory of the three properties offered by the Respondent, the road construction affected a negligible portion, approximately 10.31 hectare, which is 5-6% of the entire territory. The value of the territory necessary for the construction, even if calculated at the – unacceptable – price established in the Land Swap Agreement, is only around HUF 45,000,000 out of the total value of HUF 1,084,010,100. Therefore, even based on the Land Swap Agreement, more than HUF 1,000,000,000 worth of property is transferred beyond the area necessary for the infrastructure development, which is severely and indefensibly disproportionate. When considering the properties’ real market value based on the expert opinion, then this difference significantly exceeds HUF 1,500,000,000. It is unreasonable that the Plaintiff swaps 1/3 of the Lake Velence’s North shore, one of the country’s most outstanding vacational and natural area, for a much less valuable and not particularly well-situated territory, or rather for the necessary fraction of it. There was no reason either, why the Hungarian State needed to obtain several hectares of orchard and an out of use premises, including a shed and a water tower, for the purposes of a road construction.

NIF Zrt. – as it had informed the Plaintiff’s representative prior to the conclusion of the agreement – could have obtained the area necessary for the construction by offering a price of HUF 300-400/m², or, in case of any obstacles, it could have expropriated it. According to Section 6 (3) and (4) of Act CXXIII of 2007 on Expropriation, it would not have been necessary to appropriate the properties in their entirety, but it is also a fact that – as the appellate court correctly established – with respect to the arable lands, the Plaintiff could also have exercised its preemption right for a fraction of the purchase price indicated in the agreement. Consequently, the possibility was open for the Plaintiff to lawfully obtain the portion of the territory which was in fact necessary for the construction; however, the con-

⁶³² Exhibit R-131, pp. 22-23.

clusion of a land swap at this scale, with this content, for this alleged purpose, exceeds the limits of acceptability. On this basis, it can be established that the condition set forth in Section 13 (4) of the National Land Fund Act was not satisfied, the swap was neither necessary nor expedient or reasonable for the purposes of the linear infrastructure development, therefore the Land Swap Agreement was unlawful. Due to the unlawfulness of the Land Swap Agreement, it is null and void in accordance with Section 200 (2) of the Civil Code. Had the Land Swap Agreement been accepted as lawful, the statutory provision would fail to fulfill its social function of protecting state property, which also serves the interests of public and other investors, since it would make it possible, through the insertion of a swap element, which is irrelevant compared to the entire value of the agreement, to avoid public tendering or auction, which are assuring the guarantees of the rule of law.

The fact alone that one of the parties – or in this case the previous representative of the Plaintiff – insists that the land swap was aimed at serving a public interest, does not make the issue indisputable. The National Asset Management Council does not create law; that body, as well as the parties of this lawsuit, is bound by the law; therefore the lawfulness of the contract concluded by them or approved by the body's decision is open to judicial review.

It is an erroneous position that an unlawful contract may only be deemed null and void if the law itself ties this legal consequence to the breach of law. This interpretation would mean that breaching mandatory provisions of the law would remain without legal consequence. Section 200 (2) of the Civil Code is a general rule, which allows for the establishment of the invalidity of a contract even if it is in conflict with a provision regulating civil legal relationship, which fundamentally affects the procedure in connection with the creation of the legal relationship, the rights of representation, the contents of the contract or other significant circumstances, but does not specifically attach this legal consequence to the breach (BH2012.220).

The Respondent's argument, according to which violating the rules of tendering may indeed result in the nullity of the contract only if the law specifically prescribes this legal consequence, is correct. However, in this case the conflict with the law was constituted by the lack of tendering or auction, whereas, according to the law, the transfer of the ownership of properties could not have occurred without them.

Since the unlawfulness of the Land Swap Agreement could be determined, the Curia did not examine the merits of other reasons of invalidity and, in based on Section 275 (3) of the Code on Civil Procedure, with the modified reasons explained herein, upheld the judgment in effect.”

535. The Tribunal has carefully considered the *Curia*'s reasoning and has come to the conclusion that, contrary to Claimant's view,⁶³³ it is "*credible*" and persuasive under the circumstances. In particular, the Tribunal refers to the *Curia*'s observation that the development of the M4 motorway affected only a "*negligible portion*," *i.e.*, 5-6%, of the Albertirsa Land and the Pilis Land, which Mr. Blum offered in exchange for the Sukoró Site. There is no basis in the record to disagree with the *Curia* when it concluded that it was not necessary to "*appropriate*" the Albertirsa Land and the Pilis Land in their entirety in order to build the motorway. Therefore, the land swap was not necessary for the State, and the public interest requirement in Section 13(4) of the National Land Fund Act was not satisfied. As a consequence, the *Curia* held that the Land Swap Agreement was null and void in accordance with Section 200(2) of the Hungarian Civil Code. The Tribunal does not perceive any reason to disagree with the *Curia*'s findings and will therefore treat the Land Swap Agreement as null and void in line with the *Curia*'s decision.

536. The Parties' experts have divergent views as to the impact of the nullity of the Land Swap Agreement on the right of possession. According to Claimant's expert Dr. Tausz:

"Mr. Yoav Blum could consider the Land Swap Agreement valid irrespective of the Hungarian State's view to the contrary. The Hungarian State's declaration, proclaimed in the statement of claim filed with the Fejér County Court on 19 November 2009 that the Land Swap Agreement is invalid only created a pending situation concerning the validity of the Land Swap Agreement. Consequently, until the standpoint of the Hungarian State was substantiated by a final and binding court decision, Mr. Yoav Blum could not be required to consider the Land Swap Agreement invalid.

*Thus, until the issuance of such a final and binding court decision, Mr. Yoav Blum had the right to claim the performance of the Land Swap Agreement from the Hungarian State, and could consider the Sukoró Real Properties his own."*⁶³⁴

537. In response to this statement, Respondent's expert Prof. Varga stated that:

"Hungarian law differentiates between two kinds of invalidity: nullity (in Hungarian: 'sémmisség') and voidability (in Hungarian: 'megtámadhatóság'). Whereas nullity is absolute and unconditional,

⁶³³ Cf. Reply, ¶ 350.

⁶³⁴ Tausz I, ¶¶ 4.6.1, 4.6.2.

voidability is conditional. The reason why nullity is considered unconditional is that nullity of a contract occurs by force of the law ('ipso iure'), and the establishment of the contract's nullity does not require a court proceeding or any other proceeding. Furthermore, as also stated in Section 234(1) of the Hungarian Civil Code, every person can refer to the fact that the contract is null and void without any time limits. In contrast to this, the invalidity of a voidable contract is conditional because – as also stated in Section 235(1) of the Hungarian Civil Code – the contract will only be invalid in case a person entitled to avoid the contract avoids it within the time set by law. In this case the contract will become invalid ex tunc that is retrospectively to the time of its conclusion.

Based on the above and as confirmed by both Hungarian court practice and legal literature, the statements of Mr Patrick Tausz made in Sections 4.6.1. and 4.6.2. of his Expert Opinion are fundamentally erroneous. Mr. Tausz states that the action brought by the State of Hungary with the Fejér County Court claiming invalidity of the Land Swap Agreement 'only created a pending situation concerning the validity of the Land Swap Agreement' and that 'until the standpoint of the Hungarian State was substantiated by a final and binding court decision, Mr. Yoav Blum could not be required to consider the Land Swap Agreement invalid'. Mr. Tausz seemingly ignores the very essence of the institution of nullity under Hungarian law, that nullity of a contract is unconditional, that it occurs by force of law, and that the establishment of a contract's nullity does not require a court proceeding or any other proceeding."⁶³⁵

538. The Tribunal finds Prof. Varga's opinion well-reasoned, in particular as concerns the distinction under Hungarian private law between the two kinds of invalidity, nullity and voidability, and the absolute and unconditional character of nullity, which in the words of Prof. Varga "*occurs by force of the law ('ipso iure')*" without the requirement of a court proceeding. The Tribunal considers Prof. Varga's view convincing and therefore concludes that, as the Land Swap Agreement was null and void *ipso iure* in accordance with Section 200(2) of the Hungarian Civil Code, no legitimate right of possession within the meaning of Clause 9.3 of the Concession Contract could derive therefrom. The same reasoning applies to the right to build.
539. Claimant further argues that Respondent was responsible for both the lack of Mr. Blum's registration as the owner of the Sukoró Site and the failure of the tract formation procedure, and therefore should not be allowed to terminate the Concession

⁶³⁵ Varga I, ¶¶ 36-37.

Contract based on a ground that was brought about by its own failures. Claimant refers to its expert, Prof. Kisfaludi, who opines that Section 4(4) of the Hungarian Civil Code prohibits Respondent from relying on the lack of registration, which was due to its own failures, as a basis for the termination of the Concession Contract.⁶³⁶

540. Respondent does not seriously dispute its responsibility for the failure of the tract formation procedure, but argues that this does not preclude it from relying on the lack of registration. Respondent refers to its expert, Prof. Varga, who opines that, according to the *Curia*'s practice, the Hungarian Civil Code is not applicable to acts of administrative law, such as the issuance of the Tract Formation Permit; therefore, the culpability of civil law conduct, as required in Section 4(4), cannot be based on the alleged culpability of the administrative act of the construction authority.⁶³⁷ Prof. Varga further argues that, in any event, the construction authority's conduct would not qualify as culpable conduct within the meaning of Section 4(4). Prof. Varga refers to established case law, pursuant to which only a "*flagrantly flawed interpretation and application of the laws in force*" can amount to culpable conduct.⁶³⁸ In Prof. Varga's view, the failure of the construction authority to involve the Water Inspectorate in the tract formation procedure as a special authority for landscape protection, and the fact that the Town Clerk exceeded its subject matter jurisdiction in determining the shore line strip of the real properties, do not amount to such a "*flagrantly flawed interpretation and application of the laws in force*" and therefore do not constitute culpable conduct within the meaning of Section 4(4) of the Hungarian Civil Code.⁶³⁹
541. Respondent further states that, in any event, the tract formation procedure is irrelevant because the Land Swap Agreement was null and void and could not create any obligation for the MNV to conduct the tract formation procedure or to register Mr. Blum as the owner of the Sukoró Site.
542. Considering that the Land Swap Agreement was null and void, the Tribunal is of the view that there is no need to decide whether Respondent is precluded from relying on

⁶³⁶ Kisfaludi, ¶¶ 64, 71. Section 4(4) of the Hungarian Civil Code provides: "*Unless this Act prescribes stricter requirements, it shall be necessary to proceed in civil relations in a manner deemed reasonable under the given circumstances. No person shall be entitled to refer to his own actionable conduct in order to obtain advantages. Whosoever has not proceeded in a manner deemed reasonable under the given circumstances shall be entitled to refer to the other party's actionable conduct.*" The Tribunal notes that the English translation submitted by Claimant as Exhibit AK-28A omits the word "*not*" in the last sentence; the correct meaning of this sentence would be: *Whosoever has not proceeded in a manner deemed reasonable under the given circumstances shall not be entitled to refer to the other party's actionable conduct.*

⁶³⁷ Varga II, ¶ 19.

⁶³⁸ Varga II, ¶ 20.

⁶³⁹ Varga II, ¶ 21.

failures for which it may be responsible. The alleged mismanagement of the tract formation procedure may well have delayed the formal act of registering Mr. Blum as the owner of the Sukoró Site and may well have been due to Respondent's own failures. However, even if Mr. Blum had in fact been registered as the owner by 1 January 2011, his registration would not have made him the lawful owner of the Sukoró Site, because the Land Swap Agreement was null and void. As stated by Respondent's expert Prof. Varga, "*the Hungarian system of transfer of ownership qualifies as a system which requires a valid title for the transfer and in addition to the valid legal title, an act of transfer of the thing.*"⁶⁴⁰ Therefore, even if the failure of the tract formation procedure was indeed due to Respondent's acts or omissions, ultimately this would not change the Tribunal's decision.

c) The Tribunal's Conclusion

543. In conclusion, the Tribunal is of the view that Claimant has not established that SDI Europe had the legitimate right to possession of, and the right to build on, the Leased Real Properties as of 1 January 2011. Thus, Claimant failed to perform a material obligation of the Concession Contract and, in fact, the very first step in realizing the Project. As a consequence, the Tribunal considers that, in addition to the public policy reason set out above, Respondent also had a contractual ground for terminating the Concession Contract under Clause 9.3 with immediate effect pursuant to Clause 15.2.1.1.

G. Did Respondent Abuse its Contractual Termination Right in Order to Avoid Liability to Compensate?

544. Having reached the conclusion that Respondent had both a public policy reason and a contractual reason for terminating the Concession Contract, the remaining question is whether Respondent exercised its contractual termination right legitimately or whether, in the circumstances, it was an abuse intended to avoid the liability to compensate, thus amounting to a "*fictitious*" or "*malicious*" exercise of its contractual rights. If the latter were proven, the termination of the Concession Contract could amount to an expropriation. The burden of proof obviously lies with Claimant on this issue.

545. The Tribunal will therefore examine whether Respondent acted contrary to good faith in terminating the Concession Contract rather than granting Claimant's request for an

⁶⁴⁰ Varga I, ¶ 17.

extension of that deadline in view of the “*ongoing uncertainty surrounding the Sukoró land.*”⁶⁴¹

1. Summary of Claimant’s Position

a) Respondent Refused to Extend the Contractual Deadline

546. Claimant submits that Respondent refused to extend the contractual deadline to certify a site for the Project beyond January 2011 even after it became clear that the courts would not render a decision in the Land Swap Litigation until much later.⁶⁴²
547. Claimant further states that it was Claimant’s understanding throughout that, until the resolution of the Land Swap Litigation, the Land Swap Agreement remained valid and the Sukoró Site remained the preferred site for the Project. Claimant contends that, on 5 October 2009, a few days before the signing of the Concession Contract, Respondent’s Minister of Finance, Dr. Oszkó, assured Claimant that the Land Swap Agreement would be submitted to the Hungarian courts for validation in order to ensure that MNV’s valuations of the land concerned were correct.⁶⁴³ Claimant submits that both Mr. Blum and Mr. Langhammer left the meeting of 5 October 2009 feeling positive in anticipation that a court would either approve the value or arrive at an adjusted value, which Mr. Blum would then pay.⁶⁴⁴ According to Claimant, during his meetings with Mr. Blum on 10 September and with Messrs. Blum and Langhammer on 5 October 2009, Dr. Oszkó neither raised the possibility of starting the acquisition of the Sukoró land “*afresh*” nor did he recommend terminating the Land Swap Agreement.⁶⁴⁵
548. Claimant submits that Respondent’s witnesses indicated that they envisaged no particular timeframe for resolution of this issue by the Hungarian courts. Claimant refers to Dr. Oszkó’s oral testimony in which he admitted that he had no comprehension of how long the Land Swap Litigation would take.⁶⁴⁶
549. After Respondent initiated the Land Swap Litigation, the Project Sponsors began a diligent search for alternative sites. However, the Sukoró Site remained the preferred site for the Project notwithstanding the search for possible alternatives. According to Claimant, Respondent was aware that Claimant was investigating new sites because

⁶⁴¹ Claimant’s Post-Hearing Brief, ¶ 98.

⁶⁴² Claimant’s Post-Hearing Brief, ¶ 91.

⁶⁴³ Memorial, ¶ 450.

⁶⁴⁴ Claimant’s Post-Hearing Brief, ¶ 42.

⁶⁴⁵ Reply, ¶ 530; Claimant’s Post-Hearing Brief, ¶¶ 38 *et seq.*

⁶⁴⁶ Claimant’s Post-Hearing Brief, ¶ 92, referring to Transcript, p. 420, lines 14-19 and p. 523, lines 12-17.

Claimant conveyed this to Respondent in a letter from Mr. Gaye to Dr. Oszkó dated 26 February 2010 and in another letter which Mr. Gaye personally handed over in a meeting with Mr. Tamás Kocsis of the Ministry of National Development on 16 September 2010.⁶⁴⁷

550. Claimant submits that, on 10 December 2010, KC Bidding requested that Respondent extend the time available “*by an additional 12 months from the date when the so called Sukoró site court case will be finished with a legally binding decision.*”⁶⁴⁸ Claimant considers that this was a reasonable request given the Project Sponsors’ understanding that the availability of the Sukoró Site was dependent on the outcome of the case.⁶⁴⁹
551. Claimant submits that Respondent refused each of Claimant’s requests to extend the time available to it to comply with its obligations under the Concession Contract, while it did grant a number of modifications to both the Dream Island concession contract and the EuroVegas casino concession contract. Claimant submits that this clearly evidences discriminatory treatment vis-à-vis Claimant.⁶⁵⁰
552. Claimant further contends that Respondent’s termination of the Concession Contract was “*a disproportionate response to what were relatively minor purported contractual breaches.*”⁶⁵¹ As to the legitimate possession requirement, Claimant states that Respondent could have granted KC Bidding an extension of time “*to remedy its purported non-compliance*” with this requirement. Claimant asserts that such an approach would have been particularly proportionate in view of the “*administrative inefficiencies*” of Respondent’s own organs in the registration procedure and of the multiple investigations that Respondent launched into its own conduct in relation to the Land Swap Agreement.⁶⁵²
553. In this context, Claimant also relies on the case of *Occidental v. Ecuador* in which the tribunal held that “[t]he fact that a contractor agrees that *caducidad* [i.e., termination] may be a remedy in certain situations does not mean that the contractor has waived its right to have such a remedy imposed proportionately.”⁶⁵³

⁶⁴⁷ Claimant’s Post-Hearing Brief, ¶¶ 94 *et seq.*; **Exhibits C-144 and C-249.**

⁶⁴⁸ **Exhibit R-101.**

⁶⁴⁹ Claimant’s Post-Hearing Brief, ¶ 97.

⁶⁵⁰ Reply, ¶¶ 553-554; **Exhibits C-284, C-292 and C-295.**

⁶⁵¹ Reply, ¶ 518; *cf.* Claimant’s Post-Hearing Brief, ¶ 196.

⁶⁵² Reply, ¶ 520.

⁶⁵³ Reply, ¶ 514, quoting from *Occidental Petroleum Corporation and Occidental Exploration And Production Company v. Ecuador*, ICSID Case No. ARB/06/11, Award (5 October 2012), **Exhibit RLA-40**, ¶ 422.

554. Claimant concludes that the refusal of Respondent's representatives to meet with Claimant to discuss the status of the Project, including possible extensions of the contractual deadline that, it submits, were necessary as a result of Respondent's own conduct, constitutes a clear example of Respondent's lack of good faith.⁶⁵⁴

b) Respondent Prevented Claimant from Securing an Alternative Site

555. Claimant submits that it started its search for alternative sites, when the Land Swap Agreement was referred to the Hungarian courts, as a "*Plan B*" in case the Land Swap Litigation were not resolved in Claimant's favor by 1 January 2011. Claimant refers to Mr. Gaye's oral testimony, in which he stated that, after the MNV had initiated court proceedings to challenge the validity of the Land Swap Agreement, they "*knew that there is a risk that by 1 January 2011, there will be a judgment against Sukoró and, therefore, [they] started to look for alternative site [sic].*"⁶⁵⁵

556. Claimant submits that Mr. Gaye, who was primarily responsible for the search, identified "*a few sites in Tatabánya*" and refers to his testimony, which confirmed that they had made it clear from the beginning that they would need the Government's support before being able to purchase the land.⁶⁵⁶ According to Claimant, the owner of the site at Tatabánya was ready and willing to sell the land to Claimant for the realization of the Project; a draft purchase contract was prepared and the Project Sponsors entered into negotiations with the owner regarding the purchase price for the land.⁶⁵⁷ In Claimant's view, however, it was crucial that the newly elected Fidesz Government repeatedly failed to provide the Project with its support. Claimant concludes that, given this "*manifest denial of support for the Project,*" it decided not to purchase the Tatabánya land.⁶⁵⁸

557. Claimant further asserts that Mr. Gaye met with significant hostility in relation to possible Székesfehérvár sites and quotes Mr. Gaye's oral testimony that "*the municipality in Székesfehérvár was very hostile to [them].*"⁶⁵⁹ Claimant refers to the fact that the Székesfehérvár Council issued a decision, by which it reversed its original support for the operation of a mega-casino at its settlement.⁶⁶⁰

⁶⁵⁴ Cf. Claimant's Post-Hearing Brief, ¶ 98.

⁶⁵⁵ Claimant's Post-Hearing Brief, ¶ 205; Transcript, p. 582, lines 2-5.

⁶⁵⁶ Claimant's Post-Hearing Brief, ¶ 206, quoting Transcript, p. 599, lines 11-15.

⁶⁵⁷ Memorial, ¶ 223.

⁶⁵⁸ Memorial, ¶ 224.

⁶⁵⁹ Claimant's Post-Hearing Brief, ¶ 207; Transcript, p. 587, lines 16-17.

⁶⁶⁰ Memorial, ¶ 228.

558. Claimant submits that, after Dr. Oszkó's letter of 8 March 2010 in which he stated that Székesfehérvár remained available as a possible site for the Project despite the Székesfehérvár Council's decision to withdraw its consent, Mr. Gaye held a number of meetings with the owner of the land at Székesfehérvár. According to Claimant, however, it ascertained in consultation with its Hungarian architect that part of the land was a protected area and decided not to pursue this site any further.⁶⁶¹
559. Claimant also submits that, in November 2009 and January 2010, Mr. Gaye met with Dr. Klára Horváth, the Mayor of Bábolna to discuss whether a site they had identified at Bábolna could be used for the Project. Claimant further asserts that, when the municipality announced a tender for the sale of land at Bábolna, Dr. Budai publicly attacked Dr. Horváth by accusing her of corruption and the forgery of an official document and brought criminal proceedings against her. In light of Dr. Budai's attack and the surrounding adverse publicity, Claimant was "*compelled*" to abandon the possibility to relocate the Project to Bábolna.⁶⁶²
560. Claimant asserts that it attempted to communicate with Respondent concerning its search for alternative sites. In Claimant's view, Dr. Oszkó's response of 8 March 2010⁶⁶³ to Claimant's letter of 26 February 2010⁶⁶⁴ demonstrates Respondent's awareness that Claimant had commenced the search for alternative sites in light of the pending Land Swap Litigation. Claimant further submits that Mr. Gaye notified the Ministry of National Development of the new Fidesz Government about the search in a letter dated 16 September 2010,⁶⁶⁵ which he personally handed to Mr. Kocsis.⁶⁶⁶
561. Claimant contends that Respondent continually undermined Claimant's search for alternative sites.⁶⁶⁷ Claimant refers to Mr. Langhammer's recollection during the Hearing that "*as soon as one of the sites was identified, Dr. Budai made other noises about that site*"⁶⁶⁸ and to Mr. Fisher's statement, in relation to the land at Bábolna, that "*Bábolna is the site that the Government spokesman Budai went in the press and called that Bábolna is like Sukoró. So that site died also for us the minute he said it in the press.*"⁶⁶⁹

⁶⁶¹ Memorial, ¶ 229.

⁶⁶² Memorial, ¶¶ 225-226, 455.

⁶⁶³ **Exhibit C-145.**

⁶⁶⁴ **Exhibit C-144.**

⁶⁶⁵ **Exhibit C-249.**

⁶⁶⁶ Claimant's Post-Hearing Brief, ¶¶ 209 *et seq.*

⁶⁶⁷ Claimant's Post-Hearing Brief, ¶¶ 213-214.

⁶⁶⁸ Transcript, p. 978, lines 17-18.

⁶⁶⁹ Transcript, p. 1054, lines 19-22.

562. Claimant claims that it ultimately nominated the Sukoró Site as the site of the Project in compliance with the Concession Contract in the absence of any court decision on the Land Swap Agreement. In response to Respondent's assertion that Claimant knew at the time of the execution of the Concession Contract that the Sukoró Site was no longer "*available*" for the Project, Claimant submits that the Concession Contract itself lists the Sukoró Site as one of 133 available sites for the Project. Claimant submits that the Project Sponsors and Dr. Oszkó therefore agreed at the time of the signing that the Sukoró Site remained available unless and until a court decided otherwise.⁶⁷⁰ Claimant concludes that it was therefore not the case that, at the time of the signing, Claimant was forced to choose between starting the Land Swap Agreement "*afresh*" and finding an alternative site.⁶⁷¹

2. Summary of Respondent's Position

a) Respondent Was Not Required to Extend the Contractual Deadline

563. Respondent submits that it was under no obligation to grant the investor an extension of time to comply with its contractual obligations under the Concession Contract.⁶⁷² In Respondent's view, it was fully entitled to terminate the Concession Contract with immediate effect.

564. Respondent considers that the principle of good faith cannot be used to negate a party's contractual rights or to amend the contractual terms agreed upon by the parties.⁶⁷³ Moreover, Respondent submits, there was no duty of cooperation beyond the clear terms of the Concession Contract.⁶⁷⁴

565. Respondent refers to the drafting history of the Concession Contract and the fact that, although KC Bidding had repeatedly requested an extension of the deadline under Clause 9.3, the Ministry of Finance insisted that the deadline it had proposed was reasonable. Respondent submits that KC Bidding was therefore aware of the significance of the deadline under Clause 9.3 and could not have expected to receive any extension thereof.⁶⁷⁵

⁶⁷⁰ Claimant's Post-Hearing Brief, ¶¶ 215-216.

⁶⁷¹ Claimant's Post-Hearing Brief, ¶ 217.

⁶⁷² Counter-Memorial, ¶ 391.

⁶⁷³ Respondent's Post-Hearing Brief, ¶ 29; *cf.* ¶ 202.

⁶⁷⁴ Respondent's Post-Hearing Brief, ¶ 205.

⁶⁷⁵ Counter-Memorial, ¶ 392.

566. Respondent does not contest that Claimant repeatedly requested an extension of the contractual deadline to secure the Project site under Clause 9.3 of the Concession Contract. However, Respondent submits that Claimant had been given over a year to find a suitable alternative to the Sukoró Site.⁶⁷⁶ Respondent emphasizes that this contractual deadline to secure a Project site under Clause 9.3 was specifically negotiated by KC Bidding and the Ministry of Finance to “*reflect the absence of a confirmed site at the time of the signature of the Concession Contract,*” and to give the Project Sponsors sufficient time to secure an alternative Project site.⁶⁷⁷
567. Respondent submits that the Project Sponsors were, by early September 2009, fully aware of the risks relating to the validity of the Land Swap Agreement and of the resulting unavailability of the Sukoró Site as the Project site. Respondent refers to the undisputed fact that, on 8 September 2009, the Project Sponsors attempted, during their discussion with Mr. Árvai, to extend the contractual deadline to secure their Project site until 1 January 2014, whereas the initial draft provided for 1 January 2011. Respondent submits that Claimant was thus fully aware that it might take a few years before the issue regarding the Land Swap Agreement was finally resolved.⁶⁷⁸
568. Respondent further emphasizes that, in light of the uncertainties surrounding the Land Swap Agreement and the discussions among Mr. Blum, Dr. Bárd and Dr. Oszkó, it was decided that the Sukoró Site would not be the designated Project site in the Concession Contract and KC Bidding was instead given a choice among the 133 original settlements listed in the Tender.⁶⁷⁹ According to Respondent, this change in the Concession Contract necessarily indicates that the Parties understood that the Sukoró Site may not be available for the Project, such that the Concession Contract had to offer alternatives.⁶⁸⁰ Respondent refers to Dr. Oszkó’s oral testimony during the Hearing in which he explained that the Parties had two options in terms of pursuing the Project: agree to restore the pre-swap conditions or otherwise proceed with the Project on an alternative site.⁶⁸¹

⁶⁷⁶ Respondent’s Post-Hearing Brief, ¶ 199.

⁶⁷⁷ Respondent’s Post-Hearing Brief, ¶ 200.

⁶⁷⁸ Respondent’s Post-Hearing Brief, ¶ 122.

⁶⁷⁹ Respondent’s Post-Hearing Brief, ¶ 124.

⁶⁸⁰ Respondent’s Post-Hearing Brief, ¶ 128.

⁶⁸¹ Respondent’s Post-Hearing Brief, ¶ 129, referring to Transcript, p. 421, lines 1-8.

569. In any event, Respondent contends that the record shows that the Project Sponsors were informed and knew that, failing an agreement with the Hungarian authorities, the Land Swap Agreement would be referred to the courts.⁶⁸²
570. Respondent is of the view that the duties of good faith and cooperation cannot go beyond the unequivocal terms of the Concession Contract.⁶⁸³ Respondent concludes that Claimant had no expectation, much less a legal entitlement, that Respondent would extend the deadline. According to Respondent, “[t]here was in this respect no legal obligation to be performed by Hungary in good faith, whether under international law or Hungarian law, and moreover no duty of cooperation beyond the clear terms of the Concession Contract.”⁶⁸⁴
571. In response to Claimant’s contention that the termination was “a disproportionate response to what were relatively minor purported contractual breaches,” Respondent asserts that the principle of proportionality applies only to regulatory measures, but not to “a State’s exercise of contractual rights as an ordinary contracting party.”⁶⁸⁵ With regard to Claimant’s quotation from the case of *Occidental v. Ecuador*, Respondent submits that the contract in that case was terminated by a ministerial decree, *i.e.*, a “purely regulatory measure,” as a sanction for the breach of a statute; consequently, the decision cannot support Claimant’s argument that the proportionality principle can also be applied to a State’s exercise of contractual rights.⁶⁸⁶
572. In any event, Respondent contends that the termination of the Concession Contract was “entirely proportionate,” given that Clause 15.2 did not provide for a notification requirement or an opportunity to remedy deficiencies in relation to the termination events invoked in the Termination Letter. Respondent argues that it was therefore entitled to immediately terminate the Concession Contract in response to KC Bidding’s breaches of contract.⁶⁸⁷ In addition, Respondent submits that, by failing to find an appropriate site for the Project, “KC Bidding failed to comply with one of its core obligations under the Concession Contract”; thus, Respondent’s decision to terminate was proportionate and legitimate.⁶⁸⁸

⁶⁸² Respondent’s Post-Hearing Brief, ¶ 138.

⁶⁸³ Respondent’s Post-Hearing Brief, ¶ 202.

⁶⁸⁴ Respondent’s Post-Hearing Brief, ¶ 205.

⁶⁸⁵ Rejoinder, ¶ 400; *cf.* Respondent’s Post-Hearing Brief, ¶ 242.

⁶⁸⁶ Rejoinder, ¶ 401.

⁶⁸⁷ Rejoinder, ¶¶ 402-403; Respondent’s Post-Hearing Brief, ¶ 243.

⁶⁸⁸ Rejoinder, ¶ 404; *cf.* Respondent’s Post-Hearing Brief, ¶ 244.

b) Respondent Did Not Frustrate Claimant's Search for an Alternative Site

573. Respondent claims that, contrary to Claimant's allegations, Claimant's failure to certify "*legitimate possession*" of the Project site, as required under Clause 9.3 of the Concession Contract, is a consequence of its own decision not to secure one of the available Project sites within the deadline, and was not a result of Respondent's conduct in relation to the Land Swap Agreement.⁶⁸⁹
574. Respondent submits that both parties executed the Concession Contract on the understanding that it had become "*unlikely*" that the Project would proceed in Sukoró.⁶⁹⁰ Respondent argues that this is reflected in the drafting history of the Concession Contract in which, at the request of Mr. Blum's lawyer, Dr. Bárd, all references to the Sukoró Site were deleted and the Concession Contract was amended so that the Project could proceed in any of 133 locations listed in Annex I.⁶⁹¹ In addition, Respondent asserts that, at the 5 October 2009 meeting with Messrs. Langhammer and Blum, Dr. Oszkó advised the Project Sponsors to identify an alternative location for the Project.⁶⁹²
575. Respondent submits that KC Bidding only formally reverted to the Sukoró Site in the weeks preceding the 1 January 2011 deadline, having failed to secure an alternative site.⁶⁹³ Respondent is of the view that this was caused by the fact that Claimant had failed to find a "*suitable*" alternative site and therefore "*chose*" to abandon the sites that it had located for reasons unrelated to Respondent.⁶⁹⁴
576. With regard to the potential site in Székesfehérvár, Respondent claims that Claimant's contentions are misleading. Respondent maintains that while the Council of Székesfehérvár did seek to withdraw its support for the implementation of a casino on that settlement, Dr. Oszkó confirmed to the Székesfehérvár Council's notary that Székesfehérvár was bound by its earlier consent to the construction of a casino on its settlement.⁶⁹⁵ Respondent submits that it was Claimant's decision not to pursue this site and refers to the statement of Mr. Gaye that "*part of the land was a protected area and therefore no development could be made.*"⁶⁹⁶

⁶⁸⁹ Counter-Memorial, ¶ 395.

⁶⁹⁰ Counter-Memorial, ¶ 396.

⁶⁹¹ Counter-Memorial, ¶ 396.

⁶⁹² Counter-Memorial, ¶ 397.

⁶⁹³ Counter-Memorial, ¶ 400.

⁶⁹⁴ Respondent's Post-Hearing Brief, ¶¶ 187-188.

⁶⁹⁵ Rejoinder, ¶ 293.

⁶⁹⁶ Respondent's Post-Hearing Brief, ¶ 189, referring to Gaye I, ¶ 77.

577. With regard to the Bábolna site, Respondent claims that the documentary evidence shows that the Project Sponsors chose not to participate in the Bábolna tender in view of the short deadline for submissions.⁶⁹⁷
578. As regards the Tatabánya site, Respondent again refers to Mr. Gaye, who confirmed in his witness statement that this privately-owned site had “*the right zoning*” for the Project, and that the owner was ready and willing to sell the land to Claimant. Respondent submits that the deal fell through for reasons unknown and unexplained. Respondent further submits that Claimant failed to explain why State support would have been necessary in the context of the sale of privately-owned land and that Claimant never sought assistance with respect to the acquisition of the Tatabánya site.⁶⁹⁸
579. Respondent also refers to correspondence between Mr. Gaye and Mr. Orbán of Artonic as evidence that Respondent did not in any way interfere with Claimant’s efforts to secure an alternative site.⁶⁹⁹
580. Respondent submits that, for reasons unrelated to Hungary, Claimant never even informed the Government that it was actively searching for an alternative site, as Claimant failed to comply with its reporting obligations under the Concession Contract, which were “*the intended vehicle for the investor to inform the government of its progress in locating a Project site.*”⁷⁰⁰ Respondent asserts that the Government was kept in the dark about the search for alternative sites, and thus was persuaded that the Project Sponsors were no longer actively pursuing the Project.⁷⁰¹

3. The Tribunal’s Analysis

581. The Tribunal will consider whether the principle of good faith under Hungarian law or international law required Respondent to refrain from exercising its contractual termination right.
582. Hungarian law governs the contractual analysis of the termination, and it requires a contracting party to perform its agreement according to the principle of good faith and cooperation. Article 4(1) of the Hungarian Civil Code states:

⁶⁹⁷ Counter-Memorial, ¶ 401; **Exhibit R-93**.

⁶⁹⁸ Respondent’s Post-Hearing Brief, ¶¶ 194-196.

⁶⁹⁹ Counter-Memorial, ¶ 402; **Exhibit R-99**.

⁷⁰⁰ Respondent’s Post-Hearing Brief, ¶ 10.

⁷⁰¹ Respondent’s Post-Hearing Brief, ¶ 182.

“In the course of exercising civil rights and fulfilling obligations, all parties shall act in a manner required by good faith and mutual respect, and they shall be obliged to cooperate with one another.”

583. Under Hungarian law, if the Government were found to have exercised its contractual right of termination fictitiously or maliciously, it would have failed to act in good faith and abused its right. In those circumstances, termination would be a breach of contract actionable under Hungarian law. While contract breach under municipal law is not determinative of a Treaty breach, it may be relevant to that decision if the breach constitutes an abuse of right, and not a mere failure to perform.
584. At the same time, the Treaty and thus international law governs the decision of whether an expropriation occurred. Consequently, to the extent Hungary acted in its sovereign capacity and relied on public policy reasons in terminating the Concession Contract, international law is implicated in deciding whether the State’s conduct is expropriatory. The Tribunal has already noted that there is common ground that good faith is also a fundamental principle of public international law for the performance of international obligations. It is applicable in assessing whether the State’s exercise of a legal right, whether arising out of a contract or another source of law, is legitimate or amounts to an abuse of such right in order to avoid liability to compensate. Under the Treaty and international law addressing expropriation, if Hungary terminated the Concession Contract solely for public policy reasons, acting in its sovereign capacity, then its actions would constitute an expropriation. In making the determination of whether it acted solely for public policy reasons, a municipal law contract breach would be relevant as a factual element of the expropriation analysis if the Government articulated a contractual basis for termination abusively, whether fictitiously or maliciously, in order to avoid liability under the Treaty.
585. However, the Tribunal agrees with Respondent that the principle of good faith, whether under Hungarian law or under international law, informs the manner in which an international or, in the case of Hungarian law a contractual, obligation is to be performed, but it is not in itself an independent source of obligations.⁷⁰²

⁷⁰² Respondent’s Post-Hearing Brief, ¶¶ 27, 28. According to the International Court of Justice in the *Border and Transborder Armed Action* case, “[t]he principle of good faith is, as the Court has observed, ‘one of the basic principles governing the creation and performance of legal obligations’ (*Nuclear Tests*, I.C.J. Reports 1974, p. 268, para. 46; p. 573, para. 49); it is not in itself a source of obligation where none would otherwise exist.” *Border and Transborder Armed Actions Case (Nicaragua v. Honduras)*, International Court of Justice, Jurisdiction and Admissibility Judgment (20 December 1988), **Exhibit RLA-78**, and *Nuclear Tests Case (Australia v. France)*, Judgment, I.C.J. Reports 1974, 253, **Exhibit CLA-41**.

586. In the Tribunal's view, the impact of the obligation of good faith on the present case cannot be decided in the abstract, but depends on the concrete circumstances under which the Concession Contract was negotiated and executed. In its analysis, the Tribunal will have particular regard to (i) the Parties' discussions regarding the Land Swap Agreement and their corresponding expectations regarding the availability of the Sukoró Site for the Project prior to the signing of the Concession Contract, (ii) the role of the 132 alternative settlements as potential sites, and (iii) the reasons for Claimant's decision not to certify a site for the Project at any of those 132 alternative settlements.

a) Uncertainties Regarding the Availability of the Sukoró Site at the Time the Concession Contract Was Signed

587. In the Tribunal's view, the record shows that when KC Bidding signed the Concession Contract, it knew that the Sukoró Site might not be available for the Project. A clear piece of evidence for this is Dr. Oszkó's letter to Mr. Blum, dated 4 September 2009, more than a month before the Concession Contract was signed, in which Dr. Oszkó stated:

“As it is known to you, the swap transaction related to the Sukoró properties has given rise to significant negative reactions on behalf of the general public in the recent weeks. Moreover, several specific legal concerns have occurred with regard to the property swap which has also been objected to recently by the Hungarian State Audit Office in the recent past. With regard to the above, I consider a review of the recent events necessary because, it is my well-grounded opinion that an investment project which is granted special treatment from the aspect of national economy can only be implemented if it is done without any objections pertaining to prevailing law and the public opinion.

I am of the opinion that in the present situation, we need to find a solution for the legal concerns and those raised by the general public in relation to the property swap transaction. With regard to the latter and considering the fact that even the State Audit Office considered the property swap transaction to be legally null and void in its report, it is raised as a possibility that clarification of legal doubts and concerns can be ensured by the restoration of the previous ownerships of the properties involved in the swap transaction. Naturally, apart from and beyond these facts, I would still like to know the investor's position and solution proposals considering the legal and societal concerns occurring in wide circles, as well as the report of the State Audit Office and the prosecutorial procedures in progress before the competent state attorney offices with regard to the investment project.

I recommend that the problems be discussed at a personal meeting and for this purpose, I hereby request that you kindly contact my secretariat at the following phone number: [...].”⁷⁰³

588. The Tribunal is aware that the State Audit Office is not a judicial body that would be empowered to declare the Land Swap Agreement null and void. Nevertheless, Dr. Oszkó sent his letter of 4 September 2009 to Mr. Blum quite obviously in reaction both to publicity and to the legal concerns raised in the State Audit Office report. He referred to the fact that “*even the State Audit Office considered the property swap transaction to be legally null and void*” and raised “*a possibility that clarification of legal doubts and concerns can be ensured by the restoration of the previous ownership of the properties involved in the swap transaction.*”

589. The Project Sponsors clearly understood the import of this letter. Mr. Blum immediately forwarded it to Mr. Langhammer. The record shows that, following receipt of the letter, Mr. Langhammer instructed Mr. Blum to seek legal advice.⁷⁰⁴ Four days later, in an opinion dated 8 September 2009, Dr. Varga, Mr. Blum’s Hungarian attorney, addressed the risks regarding both the disproportionality of value and the public interest requirement that served as the basis for the opinion of the State Audit Office.⁷⁰⁵ With respect to the latter, Dr. Varga stated:

“[I]t shall be noted that there is no provision of law, or any relevant court decision delivered in a similar case, which would allow for the acquisition of the whole territory of the property even if the public interest objective could be achieved by acquiring just a part of it. In lack of any guidance from legislation, this issue can only be settled by the assessment of all available data and documents regarding the given case, or before a court.”⁷⁰⁶

590. Thus, Dr. Varga explicitly raised the issue whether the public interest objective allowed the acquisition of the whole territory of Mr. Blum’s properties that were to be swapped for the Sukoró Site given that the public interest objective could be achieved by acquiring only part of Mr. Blum’s properties – the precise issue that later served as the basis for the *Curia*’s finding that the Land Swap Agreement was null and void.

⁷⁰³ **Exhibit C-117.**

⁷⁰⁴ Transcript, p. 921, line 14 – p. 922, line 16.

⁷⁰⁵ **Exhibit C-110.**

⁷⁰⁶ **Exhibit C-277.** In its Rejoinder, Respondent pointed out that this relevant portion of Dr. Varga’s opinion was omitted in the English translation submitted by Claimant. Rejoinder, note 146.

591. It is common ground that Dr. Oszkó's letter of 4 September 2009 was followed by two personal meetings with the Minister in Hungary, the first on 10 September 2009, between Dr. Oszkó and Mr. Blum, and the second on 5 October 2009, when Dr. Oszkó met with both Mr. Langhammer and Mr. Blum. The testimonies of the participants differ as to exactly what was said at those meetings.
592. With regard to the first meeting on 10 September 2009, Mr. Blum stated in his first witness statement:

“Dr. Oszkó behaved cautiously during this meeting.

*[...] [He] repeat[ed] the concerns he raised in his letter of 4 September 2009. Indeed, it appeared to me that he was simply reading out his letter to me. [...] It seemed that he was unsure what to say.”*⁷⁰⁷

593. In his second witness statement, Mr. Blum further stated:

*“[T]o the best of my recollection Dr. Oszkó did not mention the possibility of restarting the land swap ‘afresh’ at this meeting. I am sure that I would recall if he had done so, given that I would have been open to discussing the possibility as a means of neutralising the adverse media attacks orchestrated by Fidesz around the land swap.”*⁷⁰⁸

594. Dr. Oszkó, on the other hand, stated in his first witness statement that, during the first meeting on 10 September 2009:

“I explained to Mr. Blum that it was essential that a project of this importance be based on solid legal grounds and the acquisition of the land be conducted in a transparent manner, unlike what happened. I told him I was concerned that the legality of the Land Swap Agreement would not be upheld in a court of law, and proposed to start afresh the acquisition of the land in Sukoró. Mr. Blum insisted that the Land Swap Agreement was valid and that this transaction should be left untouched.

*He offered to pay Hungary a supplement that would correct any mistake made in the valuations. This was not acceptable as a matter of Hungarian law.”*⁷⁰⁹

595. In his second witness statement, Dr. Oszkó further stated:

⁷⁰⁷ Blum I, ¶¶ 61-62.

⁷⁰⁸ Blum II, ¶ 28.

⁷⁰⁹ Oszkó I, ¶¶ 31-32.

“Mr. Blum states that I did not mention the possibility of starting the land swap transaction afresh. This is incorrect. That possibility was the main purpose for which I had organized the meeting. I had clearly announced this in my letter to Mr. Blum dated 4 September 2009 [...] The relevant part of the English translation of this letter provides that ‘it is raised as a possibility that clarification of legal doubts and concerns can be ensured by the restoration of the previous ownerships of the properties involved in the swap transaction.’ The purpose of our meeting was to discuss the possibility of starting the process again and we definitely discussed this at the meeting.

[...] I distinctly recall explaining my concern that the validity of the Land Swap Agreement would not be confirmed by a court of law.”⁷¹⁰

596. In his oral testimony at the Hearing, Dr. Oszkó stated in relation to the 10 September 2009 meeting:

“[A]s I remember, we’ve discussed whether we can restore the original situation and if yes, then how the lands can be acquired properly.”⁷¹¹

597. Concerning the second meeting among Dr. Oszkó, Mr. Blum and Mr. Langhammer on 5 October 2009, Mr. Blum claims that Dr. Oszkó said nothing about terminating the Land Swap Agreement and, instead, noted that the values of the swapped lands could be “*validated*” by referral to a competent court.

598. In his first witness statement, Mr. Blum stated:

“We also discussed the Land Swap Agreement. Dr. Oszkó explained the public pressure on him to investigate the values of the properties involved in the land swap. He mentioned that it was possible he would need to initiate a court procedure in order to validate the values of those properties. He emphasised that, if there had been impropriety in the valuation, this was solely the responsibility of the MNV. Dr. Oszkó noted that it was his responsibility to find out whether anything improper had indeed occurred with the valuation, since he was ultimately responsible for the careers of the MNV officials present in the room.”⁷¹²

599. In his second witness statement, Mr. Blum again stated:

⁷¹⁰ Oszkó II, ¶¶ 5-6.

⁷¹¹ Transcript, p. 441, lines 5-8.

⁷¹² Blum I, ¶ 65.

“Dr. Oszkó made no mention of recommencing the land swap transaction. Instead, as I have indicated previously, Dr. Oszkó explained the public pressure on him to investigate the MNV’s calculation of the values of the properties that had been swapped.

Mr. Langhammer, who was present at the meeting of 5 October, asked Dr. Oszkó if there were any substantive problems with the transaction itself, other than the concerns about the MNV’s valuations. Dr. Oszkó replied that there were none. Only the values of the swapped lands were at issue, Dr. Oszkó noted, and he stated that the values could be ‘validated’ by referral to a competent court. Dr. Oszkó said nothing about terminating the Land Swap Agreement. If he had done this, it would have been a very serious matter for the Project Sponsors. I would have reacted to him and taken immediate action in response. In fact, Dr. Oszkó only mentioned the issue of value, and this is why I offered to pay a supplement to make up the difference between the valuations conducted. If Dr. Oszkó had raised wider issues of legality, I would not have done so as it would not have made sense to offer to pay the difference between valuations if there were outstanding legal issues.”⁷¹³

600. In his testimony at the Hearing, Mr. Blum said with regard to the 5 October 2009 meeting:

“[Dr. Oszkó] did not raise the issue of the Land Swap Agreement. He raised the issue of value that were creating what he called public concern, et cetera [...]”⁷¹⁴

[...] and said that the issue of difference in value needs to be resolved.”⁷¹⁵

[...] [O]ne of his further comments was that it might be that the issue of values needs to be validated by a Court. The Court will consider and will check the issue of difference in value and will validate this concern and this issue.”⁷¹⁶

He never mentioned. He never suggested [that discussions take place to try and restore the previous ownership of the properties].”⁷¹⁷

⁷¹³ Blum II, ¶¶ 29-30.

⁷¹⁴ Transcript, p. 795, lines 18-20.

⁷¹⁵ Transcript, p. 796, lines 13-14.

⁷¹⁶ Transcript, p. 798, lines 7-11.

⁷¹⁷ Transcript, p. 798, lines 12-15.

601. Mr. Langhammer, who attended only the 5 October 2009 meeting with Dr. Oszkó, stated in his first witness statement:

“At that meeting, we discussed the land swap agreement that was by then in place between Mr. Blum and the MNV. Dr. Oszkó informed us that it was his intention to validate the land swap agreement before a Hungarian court in order to confirm that the valuation of the swapped properties had been properly executed by the MNV. We did not envisage any difficulties with the validation procedure proposed by Dr. Oszkó. Indeed, my sense was that such a court validation process could be a helpful step for all parties in clarifying the position. I also felt that it would take the sting out of the attacks being made by Fidesz by de-politicising the valuation issue. No indication of any legal concerns regarding the land swap itself was made by either Dr. Oszkó or the other MNV officials present. Dr. Oszkó stated that the Concession Contract would be signed shortly.

Mr. Blum, Dr. Bárd and I left the meeting with the Minister of Finance in a positive frame of mind. We all felt very confident that the Project was moving forward towards development.”⁷¹⁸

602. In his second witness statement, Mr. Langhammer said:

“I also raised the subject of the Land Swap Agreement at this meeting. Specifically, I asked Dr. Oszkó whether there were any legal questions arising from the Land Swap Agreement, other than the valuation of the swapped properties. Dr. Oszkó replied that there were none.”⁷¹⁹

603. In his testimony at the Hearing, Mr. Langhammer stated:

“[A]ll I recall is there is that Dr. Oszkó mentioned to me that there was no other legal issues in this regard, and I said to him, If there’s no other legal issues, then if Mr. Blum pays the difference, whatever the valuation says, will this solve the problem?

And he said he may want to validate that through a court.”⁷²⁰

604. Dr. Oszkó, on the other hand, stated in his first witness statement, with regard to the 5 October 2009 meeting:

⁷¹⁸ Langhammer I, ¶¶ 43-44.

⁷¹⁹ Langhammer II, ¶ 6.

⁷²⁰ Transcript, p. 906, lines 8-15.

“I reiterated that I was concerned with the validity of the Land Swap Agreement and that my recommendation was to terminate that Agreement on a consensual basis in order to start the acquisition afresh in a transparent manner. I further explained to Mr. Blum and Mr. Langhammer that, failing any agreement, I would be compelled to refer the question of the validity of the Land Swap Agreement to the courts. Finally, I mentioned that considering the situation, the Project Sponsors should identify an alternative location for the Project.”⁷²¹

605. In his second witness statement, Dr. Oszkó testified:

“I distinctly recall recommending at the 5 October 2009 meeting that the Land Swap Agreement be terminated on a consensual basis. My position in that regard merely reiterated what I had expressed to Mr. Blum during our 10 September 2009 meeting. And, as set forth in my first witness statement, while the discrepancy between the valuations of the swapped properties was certainly a key issue, my concern with the Land Swap Agreement was not limited to that; it extended to the transaction as a whole, which lacked transparency and appeared to have been concluded in dubious conditions.

I also explained to Mr. Langhammer and Mr. Blum that, failing an agreement, I would be compelled to refer the question of the validity of the Land Swap Agreement to the courts. Mr. Langhammer contends that I never said I would be ‘compelled’ but rather that I was ‘considering making such a referral.’ Mr. Langhammer is playing with semantics here. I do not recall the precise wording I used but I am positive that I informed the investors that the Land Swap Agreement would be referred to the courts if it was not terminated consensually. Those were the only two available alternatives to resolve the Land Swap Agreement deadlock.”⁷²²

606. In his testimony at the Hearing, when asked about Mr. Blum’s and Mr. Langhammer’s statements that there was no discussion at all about the restoration of the pre-swap conditions at the 5 October 2009 meeting, Dr. Oszkó replied:

“This was part of the letter I sent in September, so this issue was raised even a month ago. So I’m just surprised how I could – how it would have been possible not to discuss that issue since it is the main issue I have raised already a month before, discussed once with Mr. Blum and that was the only occasion that I had a discussion with Mr. Langhammer. It would have been very strange not to discuss the is-

⁷²¹ Oszkó I, ¶¶ 43-44.

⁷²² Oszkó II, ¶¶ 9-10.

*sue. That was perhaps the most important issue at that time concerning the project.*⁷²³

[...]

*On the discussion of the 5th of October, the issue was not simply the valuation. The issue was whether the transaction was made properly and if not, how can we solve the situation.”*⁷²⁴

607. The foregoing shows that the main point of disagreement between the witnesses is whether Dr. Oszkó indicated at these meetings that Mr. Blum should restore the pre-swap situation and whether Dr. Oszkó made it clear that failing an agreement with Mr. Blum, Respondent would refer the question of the validity of the Land Swap Agreement to the Hungarian courts. As regards the 5 October 2009 meeting, Mr. Langhammer’s recollection is that Dr. Oszkó said there were no legal questions arising from the Land Swap Agreement other than the value of the swapped properties, and that the court would be asked to “*validate*” the correct value in order to “*confirm that the valuation of the swapped properties had been properly executed by the MNV.*” Dr. Oszkó, on the other hand, testified in both of his witness statements that he communicated to Mr. Blum and Mr. Langhammer on 5 October 2009 that, failing an agreement with Mr. Blum, he would be compelled to refer the question of the validity of the Land Swap Agreement to the courts, although Dr. Oszkó’s oral testimony during the Hearing created doubt as to whether this was actually the case.⁷²⁵
608. The Tribunal has no basis to prefer the recollection of one witness over that of another. However, the record shows that the Project Sponsors received various warning signals before they signed the Concession Contract. These warning signs include Dr. Oszkó’s letter of 4 September 2009 and Dr. Varga’s opinion of 8 September 2009. In addition, as already noted above, Dr. Oszkó and Dr. Budai held a joint press conference before the Ministry of Finance on 8 October 2009, *i.e.*, the day before the signing of the Concession Contract. During the press conference, Dr. Budai declared that he was of the view that the Land Swap Agreement was a void agreement and that the Minister of Finance should terminate the Land Swap Agreement with immediate effect.⁷²⁶ Dr. Oszkó’s position during this press conference was cited as follows:

⁷²³ Transcript, p. 460, lines 4-13.

⁷²⁴ Transcript, p. 474, lines 10-13.

⁷²⁵ Transcript, p. 466, lines 15-22 and p. 467, lines 1-7.

⁷²⁶ **Exhibit C-124.**

“[Dr. Oszkó] highlighted that the concerns in connection with the casino investment in Sukoró are related to the plot exchange agreement and the value proportionality. According to him, a deadline should be set for reaching an agreement with the investor, and in case it is not reached, the asset manager shall think about legal steps.

Peter Oszkó added that they will try to reach primarily the cheapest solution, from the aspect of the state and highlighted that the termination of the agreement has to be compared with all the other such possibilities by which they could possibly reach a similar result, however, by involving less risk for the State.”⁷²⁷

609. In these circumstances, the Tribunal is not convinced that the outcome of the meeting of 5 October 2009 was that the court proceedings in Hungary would serve the sole purpose of “*validating*” the Land Swap Agreement in order to confirm that the valuation of the swapped properties had been properly executed by the MNV, and that there were no other legal concerns arising from the Land Swap Agreement. It is normally not the role of a court to “*validate*” valuations of properties. It may well be that there was a misunderstanding between Mr. Langhammer and Dr. Oszkó as to the purpose of the possible court proceedings. But on balance, the Tribunal cannot share Claimant’s position that the potential invalidity of the Land Swap Agreement, which had been mentioned by Dr. Oszkó in his letter of 4 September 2009 with reference to the opinion of the State Audit Office, was no longer an issue.
610. On the other hand, the Tribunal is not convinced that Respondent, at any time before the Concession Contract was signed, indicated to Claimant that it considered the Land Swap Agreement to be null and void as a matter of law prior to the Hungarian courts’ ruling on the issue. There is no evidence in the record to support such a position. In particular, Dr. Oszkó’s letter of 4 September 2009, relied upon by Respondent in this regard, referred to the opinion of the State Audit Office but did not state that it reflected his own opinion or the Government’s position generally. The fact that Respondent at the time considered a court decision necessary in order to “*invalidate*” the Land Swap Agreement is also reflected in Dr. Oszkó’s instructions to Dr. János Nagy, President of the NVT, on 8 October 2009.⁷²⁸ It is true that the record shows that the new Fidesz Government apparently took the view in 2010 that the Land Swap Agreement was null and void, without the need for a court decision. However, at the time the Concession Contract was signed, there is no evidence that such view was communicated to Claimant.

⁷²⁷ Exhibit C-124.

⁷²⁸ Exhibit C-121.

611. On the balance of the evidence, the Tribunal reaches the conclusion that, at the date of signing the Concession Contract, Claimant must have known that although the Sukoró Site was not off the table, failing an agreement with Mr. Blum on the restoration of the previous ownerships, as mentioned in Dr. Oszkó's letter of 4 September 2009, this would become the subject matter of court proceedings. The Tribunal is aware that Mr. Blum stated that he was "*surprised and shocked*"⁷²⁹ on learning, in the afternoon of 9 October 2009 after signing the Concession Contract, of the press release regarding Dr. Oszkó's instruction to the NVT to "*take the necessary legal steps to invalidate the land-swap contract.*"⁷³⁰ Mr. Langhammer also testified during the Hearing that the press release "*was a shock*" to him.⁷³¹ However, the Tribunal is of the view that it must have been clear to the Project Sponsors that such court proceedings would concern not only the possible disproportionality of the values of the swapped properties, but also the potential invalidity of the Land Swap Agreement. The issue of the potential invalidity of the Land Swap Agreement had been raised by the State Audit Office and in Dr. Oszko's letter of 4 September 2009 and both issues – the valuation issue and the potential invalidity – had been identified in Dr. Varga's opinion of 8 September 2009.
612. The Tribunal further observes that, if the Project Sponsors had really understood that the potential invalidity of the Land Swap Agreement was no longer an issue, one might have expected an immediate reaction from them after reading the Ministry's press release of 9 October 2009, as was the case on other occasions. In particular when the Special Project Status was revoked in November 2010, the Project Sponsors reacted with a series of letters to Government representatives. After the Ministry's press release, the Project Sponsors could have written a letter of complaint to Dr. Oszkó or they could have requested a meeting – which undisputedly did not happen. Rather, Mr. Blum entered into negotiations with the MNV and, when these negotiations failed, the Project Sponsors began to look for alternatives sites.

b) The Introduction of 132 Alternative Settlements for the Project Site

613. In these circumstances, the question arises why Claimant agreed in the Concession Contract to the deadline of 1 January 2011 for certifying the legitimate possession of the properties needed for the Project. As stated above, Claimant attempted to negotiate a much longer period, *i.e.*, until 1 January 2014. That proposal had been made by Dr. Bárd on 8 September 2009 at a meeting with Mr. Árvai at the Ministry of Finance

⁷²⁹ Blum I, ¶ 68; Blum II, ¶ 36.

⁷³⁰ Exhibit C-128.

⁷³¹ Transcript, p. 951, line 5.

when the first draft of the Concession Contract was discussed, and thus at a point in time when the Project Sponsors were already on notice of the legal concerns surrounding the Land Swap Agreement. Nevertheless, when Respondent refused to agree to the proposed extension, they ultimately accepted the original deadline of 1 January 2011 provided in the first draft. In the Tribunal's view, it must have been clear to the Project Sponsors, who were advised by Hungarian counsel, that such deadline would probably be too short for any final decision to be rendered if the question of the validity of the Land Swap Agreement were to be submitted to the Hungarian courts.

614. The Tribunal concludes from this that the Project Sponsors must have known upon entering into the Concession Contract that, failing an agreement between Mr. Blum and Respondent, the validity of the Land Swap Agreement would be brought before the Hungarian courts, making it uncertain whether they could certify the Sukoró Site as the site for the Project by the contractual deadline. It appears that the Project Sponsors accepted this risk because it was balanced by the inclusion of the 132 alternative sites. The Tribunal has no reason to believe that the contractual deadline of 1 January 2011 – which gave Claimant fourteen and a half months – provided too short a time period in which to acquire an alternative site for the Project.

c) The Reasons for Claimant's Decision Not to Certify an Alternative Site

615. In the Tribunal's view, Claimant has not established its allegation that the new Government actively frustrated its search for an alternative site. The record shows that Claimant considered at least three alternative sites in the relevant time period between October/November 2009⁷³² and the fall of 2010: Székesfehérvár, Bábolna and Tatabánya.

616. After Claimant identified Székesfehérvár as a potential site for the Project, the Székesfehérvár Council issued a decision on 3 December 2009 reversing its original support for the operation of a mega-casino in its settlement.⁷³³ The record shows that, in withdrawing its consent to have the Project located at its settlement, the Székesfehérvár Council followed an initiative of the Fidesz Party. On 26 February 2010,

⁷³² In its Memorial, Claimant submits that it began to search for alternative sites, after the MNV had initiated the Land Swap Litigation, *i.e.*, on 18 November 2009. Memorial, ¶ 221, referring to Gaye I, ¶ 70. In its Reply, Claimant submits that the search started, after the MNV had "*indicated its intention to commence court proceedings to invalidate the Land Swap Agreement*" and refers to its engagement of Artonic Design Kft., a local architect firm, on 9 November 2009. Reply, ¶ 69; **Exhibit C-278**. Mr. Gaye testified during the Hearing that he brought the search for alternative sites to the attention of the Project Sponsors and was told by Mr. Langhammer "*to go ahead with it*" at the end of October 2009. Transcript, p. 582, lines 6-12 and p. 583, lines 8-15.

⁷³³ **Exhibit C-280**.

Mr. Gaye wrote to Dr. Oszkó, requesting the assistance of the Ministry of Finance regarding this decision of the Székesfehérvár Council. Mr. Gaye alternatively requested that the contractual deadline to secure a Project site be extended from 1 January 2011 to 1 June 2011 to compensate for time wasted searching for sites in Székesfehérvár.⁷³⁴

617. Dr. Oszkó responded to Mr. Benkley on 8 March 2010, enclosing a copy of a letter he had written on the same date to Dr. Viktor Bóka of the Székesfehérvár Mayor's Office, stating that the decision of the Székesfehérvár Council had no effect upon the Concession Contract and that Székesfehérvár continued to be available as a potential location for the casino.⁷³⁵ This shows that at least the interim Government of Prime Minister Bajnai supported Claimant's position that it could legally secure a Székesfehérvár site.
618. Following this letter, according to the witness statement of Mr. Gaye, Claimant had several meetings with the owner of the Székesfehérvár land being considered by Claimant. However, the Project Sponsors "*realized through consultation with [their] local architect, Mr. Orbán of Artonic, that part of that land was a protected area and therefore no development could be made. As a result, [they] decided not to pursue this site further.*"⁷³⁶ This shows that Claimant decided not to pursue this site for its own reasons.
619. With regard to the Bábolna site, Mr. Gaye met with the Mayor of Bábolna, Dr. Klára Horváth, in November 2009 and again in January 2010, to discuss whether a site in Bábolna could be used for the Project.⁷³⁷ At the 21 January 2010 meeting at the Bábolna Town Hall concerning administrative procedures related to the Project (obtaining the relevant permits and licences), Mayor Horváth "*offered her help and her own contacts to support the whole procedure.*"⁷³⁸
620. On 10 August 2010, the Municipality of Bábolna announced a tender for the sale of the potential Bábolna site for the Project. Six days later, on 16 August 2010, Dr. Budai delivered a press conference in which he accused Mayor Horváth of corruption and the forgery of a public document⁷³⁹ in connection with an unrelated transaction which also involved the sale of land in Bábolna.⁷⁴⁰ During the press conference, Dr. Budai remarked that "*Bábolna was also one of these localities which showed up as a possibility*

⁷³⁴ **Exhibit C-144.**

⁷³⁵ **Exhibit C-145** enclosing **Exhibit R-83.**

⁷³⁶ Gaye I, ¶ 77.

⁷³⁷ Memorial, ¶ 225.

⁷³⁸ **Exhibit C-401.**

⁷³⁹ Memorial, ¶ 226.

⁷⁴⁰ Counter-Memorial, ¶ 262; Rejoinder, ¶ 214; Respondent's Post-Hearing Brief, ¶ 193.

when it turned out that no casino investment project was possible in Sukoró,” and that he was “*not at all surprised about this new transaction by Klára Horváth.*”⁷⁴¹ According to Claimant, and undisputed by Respondent, Dr. Budai’s allegations against Mayor Horváth subsequently proved to be baseless.⁷⁴²

621. Claimant decided not to participate in the tender. Claimant submits that it was forced to abandon Bábolna as a potential site for the Project in light of the “*toxic political environment created by Dr. Budai and the [Fidesz] Government he served.*”⁷⁴³ However, at the same time, Mr. Gaye informed Mr. Ben Molever of Miller Buckfire on 18 August 2010 that KC Management would not participate in the tender because “*there is a strong chance that this tender will be cancelled*” and the municipality of Bábolna “*want[s] offers in two weeks with detailed plans which make it unreasonable for us.*”⁷⁴⁴ It thus appears that the timing played a role in Claimant’s decision not to participate in the tender for the site. Under these circumstances, Claimant has not evidenced that it was “*compelled*” to abandon this site because of the Fidesz Government’s interference.
622. In May 2010, Claimant’s investment bankers of Miller Buckfire also visited the Tatabánya site. Claimant submits that the owner of the site was ready and willing to sell the land to Claimant for realization of the Project. A draft purchase contract was prepared and Claimant entered into negotiations with the owner regarding the purchase price of the land.⁷⁴⁵ Claimant claims that because the Fidesz Government repeatedly failed to provide the Project with the support that was integral to its success (*i.e.*, refusing to meet with Claimant’s representatives to discuss the future of the Project), Claimant did not wish to spend money on the Tatabánya site and decided not to pursue it.⁷⁴⁶ In the Tribunal’s view, the Fidesz Government’s general lack of support for the Project does not amount to actively frustrating Claimant’s search for an alternative site.
623. While the evidence indicates that the Fidesz Party, before coming to power after the national elections, sought to make a Székesfehérvár site unavailable for the Project, the

⁷⁴¹ **Exhibit C-140**; *cf.* Counter-Memorial, ¶ 263; Rejoinder, ¶ 214; Respondent’s Post-Hearing Brief, ¶ 193. *See* also Reply, ¶ 81.

⁷⁴² On 8 November 2011, the Budapest Court of Appeal affirmed the decision of the Municipal Court of Budapest at the first instance that, in making these statements, Dr. Budai had unlawfully damaged the Mayor of Bábolna’s reputation, and ordered the Fidesz Party and Dr. Budai to publish the judgment on the Fidesz Party’s website for at least 30 days and to express their regret over the violations of Hungarian law and to pay damages. Memorial, ¶ 227; **Exhibits C-143** and **C-311**.

⁷⁴³ Reply, ¶ 79.

⁷⁴⁴ **Exhibit R-93**.

⁷⁴⁵ Memorial, ¶ 223; Gaye I, ¶ 78.

⁷⁴⁶ Memorial, ¶ 224; Gaye I, ¶ 78.

interim Government intervened to maintain its availability, and Claimant admits that it did not pursue this site for other reasons. Similarly, while Dr. Budai may have attempted to make a Bábolna site difficult by his public statements, Claimant again, by its own admission, failed to pursue the site for other reasons. Thus, Claimant has not established a causal link between the actions of the Government and its failure to obtain an alternative site.

624. In conclusion, the record does not establish that Respondent prevented Claimant from obtaining an alternative site. In the Tribunal's view, despite the hostility to the Project being located at the Sukoró site, Claimant had a realistic opportunity to secure an alternative site within the contractual deadline, had it not apparently reduced its search efforts in the course of 2010. There is indeed no evidence in the record that Claimant made any further search efforts after August 2010. The Tribunal understands that the reason for Claimant's reduced efforts was its perception that the Fidesz Government was failing to provide the Project with support, in particular, by refusing to meet with Claimant's representatives and by failing to confirm its continued support for the Project in general.
625. While Claimant argues that a Project of this magnitude could hardly be successful without governmental support, it must be observed that the Concession Contract did not provide for any form of support by the Government, be it in the form of infrastructure or financial or political support. In contracting with a State, there is an inherent risk that successive governments will change their policy. Had Claimant wished to ensure governmental support, it could have negotiated and incorporated specific contractual obligations to this effect in the Concession Contract. In the Tribunal's view, having failed to do so, Claimant may not now invoke the principle of good faith to create new and specific obligations on behalf of the Government.
626. What Claimant had a right to expect was that the Government, having signed the Concession Contract, would perform it in good faith and cooperate with Claimant in accordance with the Concession Contract. But this Hungarian law obligation did not require the Government to forego its contractually-agreed right to terminate the Concession Contract when it was factually and legally supported, especially when the specific risk at issue was contractually allocated to Claimant by the inclusion of 132 alternative sites.
627. In these circumstances, it was at Claimant's own risk that it decided not to pursue its search for alternative sites. Likewise, it was Claimant's own decision to certify Sukoró as the site for the Project on 21 December 2010, despite being aware of the legal uncertainties concerning this site, and after having received Dr. Kardkovács' response to

Mr. Langhammer's 24 November 2010 letter on 17 December 2010, which did not contain the statement of support that the Project Sponsors had requested.

d) The Tribunal's Conclusion

628. Considering that Respondent added the deadline of 1 January 2011, and the 132 alternative sites, to the Concession Contract specifically to deal with the issue of the uncertainty relating to the Sukoró Site as the location for the Project and to enable the Project Sponsors to "*realize the casino project within the region in line with the law,*" the Tribunal is of the view that Respondent's exercise of its contractual termination right on the ground that Claimant had not certified the "*legitimate right to possession*" of the Sukoró Site does not demonstrate a lack of good faith on the part of the Government or an abuse of its rights under Hungarian law. The same is true for Respondent's refusal to extend the deadline until "*12 months from the date when the so-called Sukoró court case will be finished with a legally binding decision.*"
629. In this regard, the Tribunal has also taken into account the fact that, according to Dr. Budai's frank statement, the impact of the cancellation of Special Project Status was that the Project Sponsors would face "*a far longer process*" to obtain a license or permission by established procedures.⁷⁴⁷ However, the Tribunal has already noted that Special Project Status was Sukoró-specific and could not have been used to accelerate the administrative process at any of the alternative sites. Mr. Langhammer's letter of 24 November 2010 shows that the Project Sponsors were aware of this as they requested confirmation that they would obtain a new special project status once they had obtained a new site. Under these circumstances, Dr. Budai's statement does not change the Tribunal's conclusion that Respondent did not abuse its rights in terminating the Concession Contract and refusing to grant Claimant's request to extend the contractual deadline.
630. As discussed above, in a situation in which Respondent had both a public policy reason and a contractual reason for terminating the Concession Contract, Claimant's expropriation claim could only be successful if it proved that Respondent exercised its contractual termination right contrary to good faith or abused such right in order to avoid its liability to compensate under the Treaty. On the balance of the evidence, the Tribunal is of the view that Claimant has failed to discharge its burden of proof that there was such conduct on the part of Respondent.

⁷⁴⁷ Exhibit C-231.

631. Finally, the Tribunal has also taken into consideration Claimant's argument that the termination of the Concession Contract was a "*disproportionate response*" to the purported breaches.⁷⁴⁸ The Tribunal already noted above that it considers Claimant's failure to secure a Project site within the time period provided for in the Concession Contract to be a material breach of the Concession Contract, which involved the very first step in realizing the Project. Thus, the Tribunal is of the view that this case is unlike the case of *Occidental Petroleum v. Ecuador*,⁷⁴⁹ cited by Claimant in this context,⁷⁵⁰ in which the investor's contract was terminated after Occidental performed the Contract, or at least substantially performed it, spending hundreds of millions of dollars exploring for oil, drilling wells, producing oil, and marketing it. Because of the advanced stage of contract performance, the *Occidental* Tribunal was required to determine if the termination was proportional to the breach. By contrast, since contract performance in this case involved only the first, threshold step for performance, which was never consummated, no proportionality analysis can or need be performed.
632. As a final conclusion, the Tribunal holds that Claimant has not established that Respondent's termination of the Concession Contract, as a matter of fact, amounted to an expropriation of Claimant's investment pursuant to Article 4(1) of the Treaty. Consequently, the Tribunal dismisses Claimant's claim in its entirety, thus granting Respondent's request as set out above at paragraph 243 (i). As regards Respondent's request set out at paragraph 243 (ii), *i.e.*, to declare that Respondent did not expropriate Claimant's investment in Hungary, the Tribunal denies this request as being unnecessary in that such declaration is implicit in the Tribunal's decision to reject Claimant's claims in their entirety.

e) **Final Observation**

633. As a final observation, the Tribunal notes that during the course of the Project and its negotiation, certain anti-Semitic remarks were published about the Project or its Sponsors.⁷⁵¹ In Claimant's view, Respondent did not take any actions against the persons

⁷⁴⁸ Reply, ¶¶ 518 *et seq.*; Claimant's Post-Hearing Brief, ¶¶ 196 *et seq.*

⁷⁴⁹ *Occidental Petroleum Corporation and Occidental Exploration And Production Company v. Ecuador*, ICSID Case No. ARB/06/11, Award (5 October 2012), **Exhibit RLA-40**.

⁷⁵⁰ Reply, ¶ 514.

⁷⁵¹ During a demonstration against the Project, placards with Mr. Lauder's photo and the legend "*Jewish invasion of Lake Velence*" were displayed. Molnár, ¶ 39. In right-wing media sources, the Project Sponsors were referred to as "*Jewish occupiers*." **Exhibit C-101**. Mr. Blum was called an "*Israeli criminal*," even though he was ultimately acquitted of all criminal accusations. **Exhibit C-99**. Such media sources and also Dr. Budai in a press conference on 18 November 2009 repeatedly referred to the Project Sponsors' Jewish heritage. **Exhibits C-309, C-329 and C-270**. In addition, there were anti-Semitic incidents involving the former Mayor of Sukoró, Mr. Gábor Molnár, and other Sukoró Council members. Molnár, ¶¶ 37-39.

responsible for these anti-Semitic incidents and therefore violated its duty not to act in a discriminatory way.⁷⁵² Although the Tribunal does not have jurisdiction beyond the expropriation determination, the Cyprus-Hungary BIT itself does impose anti-discrimination obligations on the State (duty not to impair the operation, management, use, enjoyment, or disposal of the investment by discriminatory measures in Article 3(1); duty not to deprive investors of their investment unless the measures are not discriminatory in Article 4(1)(b)). The Tribunal also recalls that the tribunal in *FFIC v. Mexico* held that discrimination may also, to a certain extent, be relevant to the determination of whether an expropriation occurred.⁷⁵³ The Tribunal takes these concerns of discrimination very seriously. Remarks such as those published are always a concern. However, the Tribunal has not found any such remarks that are clearly attributable to the State.⁷⁵⁴ In the circumstances of this case, the Tribunal also cannot find a causal link between the publications in question and the termination of the Concession Contract since Respondent had a legitimate contractual basis for such termination. In addition, the Tribunal has noted that Respondent distanced itself from these remarks in its Counter-Memorial.⁷⁵⁵ Dr. Orbán, the Fidesz Government Prime Minister, also stated publicly that there was no place for anti-Semitism in Hungary and that “*he and the rest of the country would protect Hungary’s Jewish population.*”⁷⁵⁶ Thus, the Tribunal cannot find that the contractual termination in question was discriminatory.

VII. SUMMARY OF THE TRIBUNAL’S ANALYSIS

634. To summarize its decision, the Tribunal emphasizes the following:

- (i) It is common ground between the Parties that the Tribunal has jurisdiction only to determine whether Claimant’s investment was expropriated
- (ii) Claimant’s expropriation claim is based primarily on Respondent’s termination of the Concession Contract, purportedly on contractual grounds
- (iii) The Tribunal cannot find an expropriatory effect based on the pre-termination conduct of Respondent

⁷⁵² Memorial, ¶ 573.

⁷⁵³ *Fireman’s Fund Insurance Co. v. United Mexican States*, ICSID Case No. ARB(AF)/02/1, Award (17 July 2006), **Exhibit RLA-19**, ¶¶ 176 (j), 206. See ¶ 310 above.

⁷⁵⁴ In particular, the Tribunal has determined above that Dr. Budai’s conduct prior to his appointment as Prime Minister’s Commissioner in June 2010 cannot be attributed to Respondent. See ¶ 368 above.

⁷⁵⁵ Counter-Memorial, ¶ 148.

⁷⁵⁶ **Exhibit R-132**.

(iv) The Tribunal determined that in order to sustain its claim that the termination of the Concession Contract was expropriatory, Claimant must prove that:

(1) Respondent acted in its sovereign capacity in terminating the Concession Contract, such as for a non-contractual public policy reason, and

(2) Respondent did not legitimately terminate the Concession Contract based on a contractual ground. The latter element involves proving that: (i) the contract was not terminated by the contractual procedure but rather by legislative act or executive decree, or (ii) even if the contractual procedure was used, that the factual and/or legal basis for the invoked contractual grounds for termination did not exist, or (iii) if it did exist, that the State invoked such basis abusively, *i.e.*, either fictitiously as a mere pretext for other reasons or maliciously, thereby failing to act in good faith.

In this case, both Hungarian law and international law are relevant. Hungarian law governs the contractual analysis of the termination, but the Treaty and thus international law governs the decision of whether an expropriation occurred. To the extent Hungary acted in its sovereign capacity for a public policy reason in terminating the Concession Contract, international law is implicated in deciding if its conduct is expropriatory. The good faith standard and the related concept of abuse of rights are clearly part of Hungarian law for performance of contracts. The good faith standard is also part of international law applicable in assessing whether the State's exercise of a legal right, whether arising out of a contract or another source of law, is legitimate or amounts to an abuse of such right in order to avoid liability under the Treaty.

(v) At the outset of its analysis, the Tribunal noted that the Concession Contract was terminated by the contractual procedure, not by legislative act or decree.

(vi) As a first step in its analysis, the Tribunal determined that Respondent did terminate the Concession Contract in part based on a public policy reason, and thus acted in its sovereign capacity, to that extent, in doing so. Specifically, Respondent terminated the Concession Contract in part based on new environmental and touristic public policies. In addition, concerns about corruption in the land swap, although such concerns ultimately proved unfounded, may also have played a role in the Government's decision to terminate the Concession Contract.

(vii) In the second step of its assessment, the Tribunal determined that two of Respondent's stated reasons for termination did not legally justify termination of

the Concession Contract, but a third reason stated by Respondent was expressly provided in the Concession Contract as a basis for termination and did involve a good faith exercise of the termination right. The termination was based on the failure of Claimant to perform a material, or core, obligation of the Concession Contract, and in fact, the very first step in realizing the Project (*i.e.*, securing a site for the construction of the Project within the time period provided in the Concession Contract). Although Claimant obtained possession of the Sukoró Site and designated it, Claimant never obtained legitimate possession of, and the right to build on, that site because the Land Swap Agreement was null and void *ipso jure* for failure to satisfy the public interest requirement. Serious concerns about this issue were known to Claimant at the time the Concession Contract was signed, and precisely because the Government was going to submit the validity of the Land Swap Agreement to the courts for judicial determination (absent an agreement with Mr. Blum), the Government included in the Contract a list of 133 potential sites (still including Sukoró as one of them) at which the Project could be located. Claimant thus had ample options but failed to secure any site other than Sukoró, thereby assuming the risk that it would not have a valid title. Thus, the Government had a contractual basis for termination.

- (viii) Moving to the third step, the Tribunal decided that Respondent did not exercise its contractual termination right fictitiously or maliciously, and therefore did not abuse it. While Claimant presented some evidence indicating that the Fidesz Party, while in opposition, sought to frustrate the search for three alternative sites, for two of those sites the evidence shows that Claimant had other reasons for not securing them. As regards the third site, Claimant alleges only that the Fidesz Government, once it came to power, failed to meet with Claimant's representatives and provide support for the Project. However, this is an insufficient reason for not securing a site, as required by the Concession Contract. Respondent was required to perform the Concession Contract, as agreed and in good faith, but it was not legally required to provide general political support for the Project beyond the terms of the Concession Contract. Thus, the Tribunal cannot find any causal link between the actions of the Government and the failure of Claimant to obtain an alternative site. The Tribunal also took into account in its analysis the stage of the investment at the time of the termination. Claimant's breach involved the very first step in realizing the Project – securing a site on which to build it. No construction or operations ever took place under the Concession Contract. Thus, this case is unlike *Occidental Petroleum v. Ecuador* in which the investor's contract was terminated after Occidental performed the contract, or at least substantially performed it. Because of the advanced stage of contract per-

formance, the *Occidental* tribunal was required to determine if the termination was proportional to the breach. Under the facts of this case, however, proportionality of the termination is not an issue.

- (ix) The heart of the issue is this. The Project straddled a national election campaign and two government administrations. The first supported the Project, while the second did not. This undoubtedly put Claimant's investment in an unfortunate situation. But while the Fidesz Government did not politically support the Project, it did not breach the Concession Contract either. The Fidesz Party during the 2010 political campaign attacked the Project primarily because of suspected corruption in securing the Sukoró Site, although it must be stressed again that no corruption was ever proved. After the Fidesz Government took power in May 2010, it refused to meet with the Project Sponsors or offer the political support requested by the Sponsors. Claimant in this case has emphasized that the Project could not go forward and succeed without active government support. When it failed to obtain that support from the new Government, Claimant seems to have been unwilling to spend any more money and abandoned any real efforts to obtain an alternative site. In fact, in light of Claimant's insistence that the Project could not succeed without the new Government's active support, it seems doubtful that Claimant would really have committed the EUR 800 million necessary to build the Project at Sukoró, or elsewhere, without ongoing Government support, which was not forthcoming. While Claimant alleged that the new Government wished to destroy the Project, and presented some evidence to this effect, Claimant never tested the Government's intent to comply with the Concession Contract by obtaining a site that would satisfy Claimant's threshold contractual obligations. Since it failed to do so, Respondent had a legitimate contractual basis for terminating the Concession Contract. Had Claimant obtained a legitimate right to possession and the right to build on an alternative site, and certified it to the Government before 1 January 2011, it would have satisfied its contractual obligation and any termination at that point might well have been expropriatory. But Claimant did not do so. Also, if Claimant had proved that the Government prevented it from obtaining an alternative site, that might have been expropriatory, but Claimant failed to prove such conduct. Therefore, on the facts before it, the Tribunal concludes that there was a material breach of contract by Claimant justifying termination, and no proven abuse of right by Respondent; consequently, Claimant's investment was not expropriated by Respondent's termination of the Concession Contract.

VIII. THE TRIBUNAL'S DECISION ON COSTS

635. In its Statement of Costs dated 21 March 2014, Claimant seeks to recover from Respondent fees and expenses for legal services in the amount of EUR 6,988,039.09, fees and expenses for experts in the amount of EUR 1,485,615.42, administrative fees of ICSID and the Members of the Tribunal in the amount of EUR 289,855.07 and other costs and expenses in the amount of EUR 205,501.15, totaling the amount of EUR 8,969,010.73.⁷⁵⁷ Claimant also seeks interest on such amount at the three-month EU-RIBOR rate plus 4%, compounded on a quarterly basis, until full payment is made.⁷⁵⁸
636. In Hungary's Submission on Costs dated 21 March 2014, Respondent seeks to recover from Claimant fees and expenses of legal counsel (incurred through 13 February 2014) in the amount of USD 7,214,369,⁷⁵⁹ fees and expenses of its expert witnesses in the amount of USD 1,336,620, the amounts paid to the ICSID Secretariat in the amount of USD 375,000 and the expenses incurred by its representatives and witnesses in attending the hearings in Washington, D.C. in the amount of USD 32,161, totaling the amount of USD 8,958,150.⁷⁶⁰
637. Article 61(2) of the ICSID Convention provides as follows:
- “In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the Award.”*
638. Article 61(2) does not prescribe a particular test for tribunals to assess costs, nor does it place any restrictions on a tribunal's ability to do so. In light of this, the Tribunal understands the power granted under this Article to be broad, allowing the Tribunal discretion in making its determination.
639. Having taken into account all the circumstances of the case and exercising its discretion, the Tribunal concludes that it is fair and appropriate that the Parties bear the costs

⁷⁵⁷ Claimant's Statement of Costs dated 21 March 2014.

⁷⁵⁸ See request for relief at paragraph 222 above.

⁷⁵⁹ According to Hungary's Submission on Costs dated 21 March 2014, legal fees in the amount of EUR 1,529,094 and costs and disbursements in the amount of EUR 158,348 remain to be invoiced.

⁷⁶⁰ Hungary's Submission on Costs dated 21 March 2014.

of the arbitration⁷⁶¹ in equal shares and that each Party bears its own costs and legal fees. This conclusion is reached considering that, while Claimant has not prevailed on its expropriation claim, the only claim over which the Tribunal has jurisdiction, it has raised reasonable issues in good faith and presented an arguable case. Thus, the Tribunal, acting within its sound discretion, rejects each Party's application for costs.

IX. DECISION

640. For the reasons referred to above, the Tribunal renders the following

A W A R D

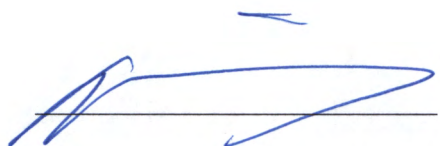
- I. Claimant's claims listed at paragraph 220 are dismissed.
- II. Respondent's claim listed at paragraph 241(i) is granted.
- III. Respondent's claims listed at paragraphs 241(ii), (iii) and (iv) are dismissed.

Consequently,

- IV. The Parties shall bear in equal shares the costs of these proceedings, comprising of the fees and expenses of the members of the Tribunal, and the expenses and charges of the Secretariat, the exact amount of which shall subsequently be notified to the Parties by the Secretariat.
- V. Each Party shall bear its own legal fees and expenses.
- VI. All other claims are dismissed.

⁷⁶¹ *I.e.*, the fees and expenses of the members of the Tribunal, and the expenses and charges of the Secretariat. The Secretariat will provide the Parties with a detailed financial statement of the case account once the account has been finalized.

THE ARBITRAL TRIBUNAL



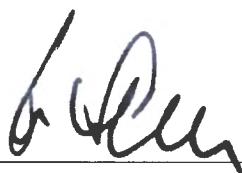
Mr. Doak Bishop
Arbitrator

Date: Sept. 22, 2014



Dr. Veijo Heiskanen
Arbitrator

Date: 26 Sept 2014



Professor Dr. Klaus Sachs
President of the Tribunal

Date: 29 Sept. 2014