

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Le Chèque Déjeuner and C.D Holding Internationale

v.

Hungary

(ICSID Case No. ARB/13/35)

Decision on Preliminary Issues of Jurisdiction

Members of the Tribunal

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

Secretary of the Tribunal

Mr. Francisco Abriani

Date of the Decision: 3 March 2016

REPRESENTATION OF THE PARTIES

LE CHÈQUE DÉJEUNER AND C.D HOLDING INTERNATIONALE:

Ms. Isabelle Michou
Mr. Laurence Shore
Ms. Laurence Franc-Menget
Mr. Peter Archer
Ms. Lisa Stefani
Herbert Smith Freehills Paris LLP
66, avenue Marceau
75008 Paris
France

HUNGARY:

Ms. Kiera S. Gans
Ms. Natasha Kanerva
DLA Piper LLP (US)
1251 Avenue of the Americas
New York, New York 10020-1104
USA

Dr. András Nemescói
Dr. Péter Gyórfi-Tóth
Dr. Dávid Köhegyi
Horvath and Partners Law Firm DLA
Piper
1124 Budapest, Csörsz u. 49-51.
Hungary

Dr. Beatrix Bártfai
Sárhegyi & Partners
Keleti Károly u. 26
H-1024 Budapest
Hungary

Dr. József Gyóri
Ministry of National Development
H-1440 Budapest, P.O.B.1.
Hungary

TABLE OF CONTENTS

I. INTRODUCTION	6
A. The Claimants	6
B. The Respondent	6
C. Background to the dispute	7
II. PROCEDURAL HISTORY	10
III. THE PARTIES' REQUESTS	17
A. The Claimants' requests on the merits	17
B. The Respondent's requests on preliminary issues and the merits.....	17
C. The Claimants' requests regarding preliminary issues	18
IV. THE TRIBUNAL'S DECISION IN PROCEDURAL ORDER NO. 2.....	19
V. SUMMARY OF THE PARTIES' ARGUMENTS IN RESPECT OF THE PRELIMINARY ISSUES.....	19
A. The Respondent's position.....	19
1. The plain wording of Article 9(2) of the Treaty.....	19
2. Supplementary means of interpretation.....	21
3. The scope of Article 4(1) of the Treaty	24
B. The Claimants' position.....	27
1. The meaning of Article 9(2) of the Treaty	28
2. The scope of Article 4(1) of the Treaty	29
a. Hungary's obligation to provide MFN treatment	29
b. MFN treatment and dispute settlement.....	31
(i) Canons of interpretation.....	31
(ii) The text of Article 4(1) of the Treaty	34
(iii) The context of Article 4(1) of the Treaty	34
(iv) Article 32 of the Vienna Convention	37
c. The legal authorities invoked by the Respondent.....	37
C. The Parties' position regarding the Tribunal's questions	41
1. Claimants indicated that there were reasons why they were relying on the Hungary–Lithuania and Croatia–Hungary BITs, implying that their provisions were most favorable for Claimants. Why, specifically, are Claimants relying on these two	

BITs? Are there any other specific Hungary BITs that Claimants rely upon? If so, for what reasons?.....	41
2. Is the right to pursue dispute settlement proceedings in the France–Hungary BIT / in any BIT a self-standing right, independent of any of the other provisions of the treaty, or is it a right that is ancillary to a substantive right set out elsewhere in the treaty?	42
3. If it is an ancillary right, does this have any implication for Claimants’ reliance on the Hungary–Lithuania and Croatia–Hungary BITs to found the right to pursue arbitration in respect of its FET claims?.....	46
4. On the assumption, <i>arguendo</i> , that an MFN clause in a BIT could operate to import into the treaty a dispute settlement clause from another BIT, are there any limitations on what elements of the dispute settlement modalities can be imported?..	48
VI. THE TRIBUNAL’S CONSIDERATIONS AND CONCLUSIONS	50
A. Introductory note.....	50
B. Treaty interpretation and jurisprudence of other tribunals	52
C. Respondent’s procedural objection.....	54
D. Wording of Article 9(1) and (2) of the Treaty	54
E. Construing an MFN clause	56
F. Application of the MFN clause to import provisions of future BITs	57
G. Limits on the scope of application of an MFN clause	60
H. Wording of Article 4(1) of the Hungary – France BIT.....	62
1. “Territory”	63
2. “Activities” and “treatment”	64
3. “More advantageous”	64
4. Article 25(1) of the ICSID Convention.....	65
I. Context of other provisions in this Treaty	65
J. Application of the MFN clause to import arbitration provisions.....	67
K. No renegotiation after 10 years under Article 12.....	67
L. Relevant jurisprudence of other tribunals	68
M. The Tribunal’s jurisdiction regarding Article 3 of the Treaty.....	71
N. Costs.....	74
O. Decisions.....	75

FREQUENTLY USED ABBREVIATIONS AND ACRONYMS

“Arbitration Rules”	ICSID Rules of Procedure for Arbitration Proceedings of 10 April 2006
“BIT”	Bilateral Investment Treaty
“Counter-Memorial”	Respondent’s Counter-Memorial on the Merits, Objections to Jurisdiction and Request for Bifurcation dated 17 July 2015
“ICSID Convention”	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
“ICSID” or the “Centre”	The International Centre for Settlement of Investment Disputes
“Memorial”	Claimants’ Memorial on the Merits dated 19 January 2015
“MFN”	Most-Favoured Nation
“Reply”	Claimants’ Reply on Objections to Jurisdiction and Response to Request for Bifurcation dated 23 October 2015
“Request” or “RfA”	Request for Arbitration dated 3 December 2013
“Treaty” or “France-Hungary BIT”	Agreement between the Government of France and the Government of the Hungarian People’s Republic for the Promotion and Reciprocal Protection of Investments dated 30 September 1987
“Vienna Convention” or “VCLT”	Vienna Convention on the Law of Treaties concluded at Vienna on 23 May 1969

I. INTRODUCTION

A. The Claimants

1. The Claimants in these proceedings are Le Chèque Déjeuner (“**LCD**”), a cooperative company (*société cooperative de production à forme anonyme et capital variable*) incorporated under the laws of France, and C.D Holding Internationale (“**CD Internationale**”), a simplified joint stock company (*société par actions simplifiée*) wholly owned by LCD and also organized under the laws of France (collectively the “**Claimants**”).¹

2. The Claimants are represented in these proceedings by:

- Isabelle Michou, Herbert Smith Freehills LLP
- Laurence Shore, Herbert Smith Freehills LLP
- Laurence Franc-Menget, Herbert Smith Freehills LLP
- Peter Archer, Herbert Smith Freehills LLP
- Lisa Stefani, Herbert Smith Freehills LLP

B. The Respondent

3. The Respondent is Hungary (the “**Respondent**”), a sovereign State represented in these proceedings by:

- Camilo Cardozo, DLA Piper LLP (US)²
- Kiera Gans, DLA Piper LLP (US)
- Natasha Kanerva, DLA Piper LLP (US)
- András Nemescsóí, HORVÁTH & PARTNERS DLA PIPER
- David Köhegyi, HORVÁTH & PARTNERS DLA PIPER
- Dr. Beatrix Bártfai, SARHEGYI & PARTNERS LAW FIRM

¹ Extrait Kbis de C.D Holding Internationale, 12 September 2013, C-0002; Décision de Le Chèque Déjeuner autorisant le recours à l'arbitrage CIRDI, 13 November 2013, C-0003; and Décision de C.D Holding Internationale autorisant le recours à l'arbitrage CIRDI, 13 November 2013 C-0004. See also Claimants' Memorial on the Merits (the “**Memorial**”), paras. 9-12.

² Until 2 February 2016.

- Dr. József Győri, Ministry of National Development, Hungary

C. Background to the dispute

4. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes (“*ICSID*” or the “*Centre*”) pursuant to the bilateral investment treaty between France and Hungary (the “*Treaty*”), which entered into force on 30 September 1987, and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the “*ICSID Convention*”). Pursuant to the legal arguments described below, Claimants also rely on the bilateral investment treaty between Hungary and Croatia, which entered into force on 1 March 2002, and the bilateral investment treaty between Hungary and Lithuania, which entered into force on 20 May 2003.³
5. The dispute relates to certain legal and tax reforms that impacted the Claimants’ fringe voucher business in Hungary.
6. Le Chèque Déjeuner Kft (“*CD Hungary*”) is the Claimants’ wholly-owned subsidiary in Hungary. It was created in November 1996 and began operations in 1997. CD Hungary is a fringe voucher issuer. According to the description provided by the Parties, the fringe voucher business essentially consists in the following sequence: (i) an issuer sells vouchers to employers at a face value plus a commission; (ii) the employer grants vouchers to employees as part of a broader compensation package; (iii) employees use their vouchers to pay for various goods and services at affiliates that have themselves entered into an agreement with the issuer in order to accept such vouchers as payment methods; and (iv) the affiliates claim payment from the issuer for the face value of the collected vouchers minus a commission. Voucher issuers consequently derive revenues from: (i) the commissions charged to employers and affiliates; (ii) investments made during the period between voucher issuance to

³ In their Post-Hearing Brief, however, the Claimants assert that they now rely solely on the Hungary-Lithuania BIT (Claimants’ Post-Hearing Brief, para. 7).

employers and reimbursement to affiliates; and (iii) unclaimed vouchers (such as lost or expired vouchers) the face value of which is retained by the issuer.⁴

7. The employers' incentive to buy vouchers, and the employees' incentives to use them, hinges on a preferential tax treatment. Unlike standard cash compensation, vouchers are either tax exempt (both from payroll tax for employers and income tax for employees) or taxed at a lower rate, within a determined limit.⁵
8. CD Hungary was primarily active in the food voucher business, including both "cold food" vouchers for use at supermarkets and grocery stores and "hot food" vouchers for use at restaurants. It marginally issued gift vouchers as well as school supplies vouchers.
9. In 1999 and 2000, two tax reforms were passed. First, the tax rate applicable to cold food vouchers and gift vouchers was substantially increased, prompting CD Hungary to focus on hot food vouchers only. Later, the tax rates applicable to hot and cold food vouchers were re-aligned, prompting CD Hungary to create a new type of vouchers that could be redeemed for both kinds of food.
10. In 2011, a reform was passed that amended the regulations applicable to fringe vouchers. First, the government created SZEP cards, a dematerialized alternative to paper vouchers. SZEP card issuers would open accounts that employers could credit as part of their employees' compensation plans. Employees would in turn be issued a SZEP card and use it to pay for various goods, including hot meals. Claimants did not meet the legal conditions required to issue SZEP cards. Second, the government created Erzsébet vouchers, which could be used to pay for cold food (and eventually also hot food). Only the *Magyar Nemzeti Üdülési Alapítvány* ("MNUA"), a public entity, was authorized to issue such vouchers. Because only the SZEP cards and the

⁴ Memorial, paras. 87-95; Hungary's Counter-Memorial dated 17 July 2015 (the "*Counter-Memorial*"), paras. 26-32.

⁵ Memorial, para. 92; Counter-Memorial, para 29.

Erzsébet vouchers – contrary to the vouchers issued by CD Hungary – benefited from lower tax rates, CD Hungary’s services grew increasingly unappealing to employers.⁶

11. The Claimants initiated discussions with the government of Hungary and sought political and diplomatic assistance from their home government. They also initiated legal actions at the EU level. However, they were unsuccessful in convincing the Respondent to amend the voucher regulations. CD Hungary’s market share and revenues plummeted, leading to the layoff of all but one employee and the cessation of operations in 2013.⁷
12. According to the Claimants, the Respondent’s aforementioned reforms resulted in the expropriation of their investment in Hungary and breached the Respondent’s obligation to treat their investment fairly and equitably, thus breaching both Article 5(2) and Article 3 of the Treaty.⁸
13. The Respondent contends that the reforms were a response to the global financial crisis and, more generally, that they had to address various shortcomings with the voucher system.⁹ In addition, as stated in section IV below, the Respondent contends that Hungary’s consent to ICSID jurisdiction under Article 9(2) of the Treaty is limited to dispossession measures, and rejects the Claimants’ theory according to which the dispute resolution clauses under the Hungary-Croatia BIT and the Hungary-Lithuanian BIT – which allow the submission of any dispute to ICSID jurisdiction and are therefore broader than Article 9(2) of the Treaty – could apply to this dispute by virtue of the most-favoured-nation clause contained in Article 4(1) of the Treaty.

⁶ Memorial, paras. 163-168; Counter-Memorial, paras. 60-84.

⁷ Memorial, paras. 169-213.

⁸ Memorial, paras. 240 *et seq.*

⁹ Counter-Memorial, paras. 48-59.

II. PROCEDURAL HISTORY

14. On 3 December 2013, ICSID received a request for arbitration of the same date from Le Chèque Déjeuner and C.D Holding Internationale against Hungary (the “*Request*” or “*RfA*”).
15. On 23 December 2013, the Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an Arbitral Tribunal as soon as possible in accordance with Rule 7(d) of the Centre’s Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.
16. By letter of 29 January 2014, the Claimants noted that in paragraph 120 of the Request, the Respondent was given 10 days from the date of registration to agree with the Claimants’ proposed method of constitution. In the absence of a response from the Respondent, the Claimants requested that the Tribunal be constituted in accordance with Article 37(2)(b) of the ICSID Convention, with one arbitrator appointed by each Party, and a President appointed by agreement of the Parties.
17. By letter of 18 February 2014, the Respondent noted that it was in the process of engaging counsel and would revert on its proposed method of constitution within the 60-day period following registration.
18. By letter of 24 February 2014, the Claimants noted that the 60-day period had expired, and requested that constitution proceed under Article 37(2)(b).
19. By letter of 26 February 2014, the Claimants appointed The Honourable L. Yves Fortier, PC CC OQ QC (Canadian) as arbitrator, and proposed Professor Gabrielle Kaufmann-Kohler as the President of the Tribunal.
20. By letter of 6 March 2014, ICSID notified the Parties of The Honourable L. Yves Fortier’s acceptance of his appointment.

21. By letter of 28 March 2014, the Respondent appointed Sir Daniel Bethlehem, KCMG QC (British) as arbitrator.
22. By letter of 1 April 2014, ICSID notified the Parties of Sir Daniel Bethlehem's acceptance of his appointment.
23. By letter of 8 April 2014, the Parties informed ICSID that they had agreed to appoint the President within 30 days of the date of the letter.
24. By letter of 8 May 2014, the Parties conveyed their agreement to postpone the deadline for appointment of the President to 16 May 2014.
25. By letter of 22 May 2014 from the Respondent, and by email of the same date from the Claimants, the Parties informed ICSID of their agreement to appoint Professor Kaufmann-Kohler as President.
26. By letter of 6 June 2014, ICSID informed the Parties that Professor Kaufmann-Kohler was unable to accept her appointment.
27. By letter of 16 June 2014, the Parties informed ICSID of their agreement to appoint Professor Karl-Heinz Böckstiegel (German), but requested that prior to seeking his acceptance, ICSID provide a shortlist of potential candidates for the role of President.
28. By letter of 20 June 2014, ICSID proposed a list of five candidates for President, and informed the Parties that if they were unable to reach an agreement within five days of the date of the letter, ICSID would proceed to seek Professor Böckstiegel's acceptance under ICSID Arbitration Rule 5(2).
29. By email of 25 June 2014, the Parties informed ICSID of their agreement to proceed with the appointment of Professor Böckstiegel. ICSID sought Professor Böckstiegel's acceptance by letter of the same date.
30. By letter of 30 June 2014, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the "*Arbitration Rules*") notified the Parties that all three arbitrators had accepted their appointments and that

the Tribunal was therefore deemed to have been constituted on that date. Mr. Benjamin Garel, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

31. The first session of the Tribunal with representatives of the Parties was held in Washington, D.C. on 12 September 2014. During that conference, the Parties confirmed that the Tribunal was properly constituted and that they had no objection to the appointment of any member of the Tribunal.
32. Also at the first session, it was agreed that this arbitration would be conducted in English and that it would proceed in accordance with the ICSID Arbitration Rules in force as of 10 April 2006. The Tribunal discussed with the Parties a previously circulated provisional agenda and draft procedural order, and established by agreement a timetable for this proceeding that formed Annex A of Procedural Order No. 1.
33. On 8 October 2014, the Tribunal issued Procedural Order No. 1.
34. Pursuant to the timetable established at the first session and included as Annex A to Procedural Order No. 1, on 19 January 2015, the Claimants filed a Memorial on the Merits accompanied by the witness statements of Benedek Dér, Márta Nagy and Yvon Legrand, and the expert report of FTI authored by Anthony Charlton.
35. By letter of 2 June 2015, the Respondent informed ICSID of the Parties agreement to modify the procedural calendar, subject to the Tribunal's approval. By email of 10 June 2015, the Claimants confirmed their acceptance of the proposed modifications.
36. By letter of 12 June 2015, ICSID transmitted the amended timetable, as reviewed and revised by the Tribunal, to the Parties.
37. By letter of 1 July 2015, the Respondent requested a one-week extension to file its Counter-Memorial and accompanying documents.
38. By letter of 3 July 2015, the Claimants objected to the Respondent's requested extension.

39. By letter of 7 July 2015, ICSID informed the Parties that the Tribunal granted an extension to the Respondent to file its submission, and similarly granted an equivalent extension to the Claimants to file their next submission.
40. On 17 July 2015, the Respondent filed a Counter-Memorial on the Merits and objections to jurisdiction, along with witness statements of Kristóf Szatmáry and Zoltán Guller, and the expert report of Navigant Consulting authored by Brent Kaczmarek and Kiran Sequiera. On the same date, the Respondent requested that the proceedings be bifurcated and that Hungary's jurisdictional objections be decided before the Tribunal considered the merits of the Claimants' allegations.
41. On 23 October 2015, the Claimants filed a Reply on Objections to Jurisdiction and Response to Request for Bifurcation. On the same date, the Secretary-General informed the Parties that Francisco Abriani, ICSID Legal Counsel, would replace Benjamin Garel as Secretary of the Tribunal in this proceeding.
42. On 12 November 2015, the Tribunal issued Procedural Order No. 2, by which it decided that the proceedings would be bifurcated and the Tribunal's jurisdiction would be determined as a preliminary issue. A hearing in London was therefore scheduled for 13 January and the morning of 14 January 2016.
43. On 2 December 2015, the Claimants submitted an email recording their agreement with the Respondent as to the procedure to be followed in the event that either Party wished to submit any additional documents prior to the hearing on jurisdiction, and attaching a draft hearing timetable also agreed with the Respondent. On the same date, the Respondent confirmed the Parties' agreement as recorded in the Claimants' email.
44. By email of 4 December 2015, the Tribunal informed the Parties that it agreed with their proposal regarding the hearing timetable and the procedure for the submission of new documents.
45. By letter of 7 December 2015, the Respondent submitted an application for leave to produce additional documents in relation to its argument that the Tribunal lacks jurisdiction to hear the Claimants' non-expropriation claims.

46. By letter of 9 December 2015, the Claimants requested that the Respondent's application for leave to produce new documents be denied.
47. By letter of 13 December 2015, the Tribunal decided to give permission for the documents proposed by the Respondent to be introduced at this stage of the proceedings, and invited the Claimants to submit comments regarding those documents either in writing within one week or orally at the hearing. In the same letter, the Tribunal also granted permission to the Claimants, on application, to introduce any fresh documents of their own that may be responsive to the issues of interpretation raised by the new documents introduced by the Respondent.
48. On 15 December 2015, the Respondent submitted, by email, four new documents labelled RL-0129, RL-0130, RL-0131 and RL-0132, pursuant to the Tribunal's decision of 13 December 2015.
49. By letters of 23 December 2015, the Claimants and the Respondent submitted their respective Requests for Production of Documents pursuant to section 15.6 of Procedural Order No. 1.
50. On 13 and 14 January 2015, the Tribunal held a hearing on jurisdiction with the Parties at the International Dispute Resolution Centre (IDRC) in London, United Kingdom. Present at the hearing were:

Members of the Tribunal:

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

ICSID Secretariat:

- Mr. Francisco Abriani, Legal Counsel, ICSID

For the Claimants:

- Ms. Isabelle Michou, Herbert Smith Freehills LLP
- Mr. Laurence Shore, Herbert Smith Freehills LLP

- Mr. Peter Archer, Herbert Smith Freehills LLP
- Ms. Lisa Stefani, Herbert Smith Freehills LLP
- Ms. Dora Tamas, Herbert Smith Freehills LLP
- Ms. Elizaveta Tukhsanova, Senior Legal Counsel

For the Respondent:

- Ms. Kiera Gans, DLA Piper LLP (US)
- Mr. Stanley McDermott, DLA Piper LLP (US)
- Ms. Natasha Kanerva, DLA Piper LLP (US)
- Mr. András Nemescsófi, HORVÁTH & PARTNERS DLA PIPER
- Mr. David Köhegyi, HORVÁTH & PARTNERS DLA PIPER
- Ms. Zsafia Deli, HORVÁTH & PARTNERS DLA PIPER
- Ms. Viktoria Perenyi, Sarhegyi and Partners Law Firm
- Mr. Gergely Riszter, Baker and McKenzie Budapest

Court Reporter

- Mr. Trevor McGowan

51. On 19 January 2016, the Tribunal issued Procedural Order No. 3, requesting the Parties to submit their corrections to the hearing transcript by 22 January 2016, and submit their Post-Hearing Briefs, together with a bundle containing the full text of all Hungary’s BITs and a table listing those BITs,¹⁰ by 5 February 2016. In the same Order, the Tribunal requested that the Parties’ Post-Hearing Briefs contain the following:

“2.1.1 Any comments they have regarding issues raised at the Hearing;

2.1.2. In separate sections of the brief, any comments the Parties have regarding the following questions, which are without prejudice to any issues that the Tribunal considers relevant for its final decision:

For the Claimants:

¹⁰ Procedural Order No. 3, paragraph 2.2, which provided the guidelines for preparing the requested table.

a) Claimants indicated that there were reasons why they were relying on the Hungary–Lithuania and Croatia–Hungary BITs, implying that their provisions were most favorable for Claimants. Why, specifically, are Claimants relying on these two BITs? Are there any other specific Hungary BITs that Claimants rely upon? If so, for what reasons?

For both Parties:

b) Is the right to pursue dispute settlement proceedings in the France–Hungary BIT / in any BIT a self-standing right, independent of any of the other provisions of the treaty, or is it a right that is ancillary to a substantive right set out elsewhere in the treaty?

c) If it is an ancillary right, does this have any implication for Claimants’ reliance on the Hungary–Lithuania and Croatia–Hungary BITs to found the right to pursue arbitration in respect of its FET claims?

d) On the assumption, *arguendo*, that an MFN clause in a BIT could operate to import into the treaty a dispute settlement clause from another BIT, are there any limitations on what elements of the dispute settlement modalities can be imported?

2.1.3 Any further comments the Parties have regarding the allocation of costs.”¹¹

52. On 22 January 2016, the Tribunal issued Procedural Order No. 4, containing the Tribunal’s decisions on the Parties’ document production requests, and ordering the Parties to produce the relevant documents by 12 February 2016.
53. On 5 February 2016, the Parties submitted their respective Post-Hearing Briefs.
54. On 8 February 2016, the Claimants submitted a link allowing access to the electronic copies of Hungary’s BITs, and informed the Tribunal that the Parties were still working on the table requested at paragraph 2.2 of Procedural Order No. 3.
55. On 11 February 2016, the Parties submitted emails recording their agreement to postpone the deadline for the production of documents until 19 February 2016. On the same date, the Parties informed the Tribunal that they were still in the process of finalizing the table referred to at paragraph 2.2 of Procedural Order No. 3.

¹¹ Procedural Order No. 3, paragraphs 2.1.2 and 2.1.3.

56. On 16 February 2016, the Parties were informed that the Members of the Tribunal had no objections to the Parties' agreement to postpone the deadline for the production of documents until 19 February 2016.
57. On the same date, the Parties submitted a table listing all Hungary's BITs pursuant to Procedural Order No. 3.

III. THE PARTIES' REQUESTS

A. The Claimants' requests on the merits

58. In their Memorial on the Merits, the Claimants requested the Tribunal as follows:
- To find that Hungary expropriated LCD and CD Internationale of their investment in Hungary within the meaning of Article 5(2) of the Treaty;
 - To find that the statutory and regulatory reforms of fringe benefit vouchers launched in April 2011 are contrary to the guarantee of fair and equitable treatment given by Hungary, and thereby breach Article 3 of the Treaty;
 - To award compensation to LCD and CD Internationale for their entire loss in the amount of €31,163,000 plus compound interest subject to adjustment until the date of payment; and
 - To order Hungary to pay all costs, expenditures and fees in respect of the arbitration proceedings including legal fees incurred by LCD and CD Internationale.¹²

B. The Respondent's requests on preliminary issues and the merits

59. In its Counter-Memorial, the Respondent requested the Tribunal as follows:

¹² Memorial, para. 419.

- To decline jurisdiction over this dispute with respect to Claimants' claims under Article 3 of the Treaty due to the absence of Respondent's consent to ICSID jurisdiction over such claims;
- To dismiss all Claimants' claims under Article 5(2) of the Treaty;
- In the event that the Tribunal determined that it has jurisdiction over the claim under Article 3, to dismiss those claims in their entirety; and
- To award Hungary all of the costs and expenses incurred in these proceedings, including attorney's fees.¹³

C. The Claimants' requests regarding preliminary issues

60. In its Reply on Objections to Jurisdiction and Response to Request for Bifurcation, the Claimants requested the Tribunal as follows:

- To reject the Respondent's jurisdictional objections in their entirety;
- To decide that it has jurisdiction over the present dispute including all the Claimants' claims under the Treaty;
- To order the Respondent to pay the Claimants' costs, including legal fees, incurred as a result of any eventual bifurcation of these proceedings;
- To take all necessary steps for the continuation of the arbitration towards the liability and quantum phases; and
- To grant the relief sought by the Claimants on the merits of their claims.¹⁴

¹³ Counter-Memorial, para. 307.

¹⁴ Claimants' Reply on Objections to Jurisdiction and Response to Request for Bifurcation (the "**Reply**"), para. 162.

IV. THE TRIBUNAL'S DECISION IN PROCEDURAL ORDER NO. 2

61. In its Procedural Order No. 2, the Tribunal decided that the proceedings should be bifurcated and that the Tribunal's jurisdiction over claims of the Claimants relating to Article 3 of the BIT should be determined as a preliminary issue. The Tribunal also determined that a hearing on the preliminary issue should be held in London starting in the morning of 13 January and ending by 12:30 hours on 14 January 2016.¹⁵
62. As explained at paragraph 44 above, on 4 December 2015 the Tribunal informed the Parties that it agreed with the hearing timetable proposed by the Parties on 2 December 2015.

V. SUMMARY OF THE PARTIES' ARGUMENTS IN RESPECT OF THE PRELIMINARY ISSUES

A. The Respondent's position

63. The Respondent contends that Hungary did not consent to the arbitration of any claims other than those for alleged breaches of Article 5(2) of the Treaty, which concerns dispossession measures.¹⁶ Furthermore, the Respondent alleges that the Claimants' "reliance on the MFN clause is hopeless because MFN clauses cannot extend a tribunal's jurisdiction to hear claims that have been expressly excluded by the applicable treaty, as is the case here."¹⁷

1. The plain wording of Article 9(2) of the Treaty

The Respondent notes that Article 25(1) of the ICSID Convention limits this Tribunal's jurisdiction to only those disputes that the Parties have consented in writing to submit to ICSID.¹⁸ According to the Respondent, it is also well-accepted that consent must be explicit and unambiguous, and cannot be inferred or presumed.¹⁹ The Respondent

¹⁵ Procedural Order No. 2, dated 12 November 2015.

¹⁶ Counter-Memorial, para. 105.

¹⁷ Counter-Memorial, para. 106.

¹⁸ Counter-Memorial, para. 108.

¹⁹ Counter-Memorial, para. 109; and Respondent's Post-Hearing Brief, paras. 3 and 6.

stresses that “host States are free to restrict their consent as they wish, including or excluding certain types of disputes, or creating any necessary conditions precedents thereto, and it is for arbitral tribunals to respect rather than flout such limitations to their jurisdiction.”²⁰

64. The Respondent asserts that where consent is provided in the form of a treaty, any expression of consent must be interpreted in a manner consistent with traditional canons of interpretation, specifically those established in Article 31 of the Vienna Convention on the Law of Treaties (the “*Vienna Convention*” or “*VCLT*”).²¹
65. According to the Respondent, Hungary’s consent to arbitration in the Treaty is expressly limited to a specific sub-category of disputes.²² The Respondent asserts that the plain wording of Article 9(2) leads to the conclusion that the Contracting Parties’ consent to ICSID jurisdiction is limited exclusively to disputes related to dispossession measures allegedly in violation of Article 5(2) of the Treaty.²³ In the Respondent’s view, the Contracting Parties’ derogation of sovereignty for cases involving purported expropriations is an exception to the rule that all other disputes between foreign investors and a Contracting State be resolved by domestic remedies.²⁴

²⁰ Counter-Memorial, para. 109.

²¹ Counter-Memorial, para. 110.

²² Counter-Memorial, para. 111.

²³ Counter-Memorial, paras. 112-113; and Respondent’s Post-Hearing Brief, para. 5. Article 9(2) of the Treaty provides in relevant part as follows:

“However, disputes concerning dispossession measures as provided for in article 5, paragraph 2, particularly those relating to compensation, its amount, conditions of payment and interests to be paid in the case of delayed payment, shall be settled under the following conditions:

If any such dispute cannot be settled amicably within six months . . . it shall . . . be submitted for arbitration . . .

When each Contracting Party shall have become party to the [ICSID Convention], it . . . shall be submitted for arbitration to the International Centre for Settlement of Investment Disputes.” (RL-0079)

²⁴ Counter-Memorial, para. 112.

66. The Respondent further argues that similarly worded clauses have been interpreted in the same way by other arbitral tribunals.²⁵ In support of its proposition, the Respondent cites several arbitral decisions and awards, including those rendered in *Emmis International Holding B.V. and others v. Hungary* (which involved the interpretation of the Hungary-Netherlands and the Hungary-Switzerland BITs),²⁶ *Telenor Mobile Communications A.S. v. The Republic of Hungary* (which involved the Hungary-Norway BIT),²⁷ *Accession Mezzanine v. Hungary* (concerning the UK-Hungary BIT),²⁸ and *Les Laboratoires Servier and others v. Poland* (which involved the France-Poland BIT).²⁹

2. Supplementary means of interpretation

67. According to the Respondent, supplementary sources of interpretation confirm that the parties intended that their consent be limited to disputes involving claims of dispossession.³⁰

68. The Respondent relies on the following statement made in 1987 by Mr. Pierre Raynal, France's former rapporteur of the Committee of Foreign Affairs, before the French National Assembly regarding the scope of the arbitration clause in the BIT:

“Generally, arbitration is applicable to all clauses of investment treaties. Here, this is limited to disputes related to dispossession measures, the other disputes fall within the scope of internal jurisdiction. This special feature is limited in the practice, as only disputes related to a dispossession justify the cost of an international arbitration proceeding.”³¹

²⁵ Counter-Memorial, paras. 113-118.

²⁶ Counter-Memorial, para. 114.

²⁷ Counter-Memorial, para. 115.

²⁸ Counter-Memorial, para. 116.

²⁹ Counter-Memorial, para. 117.

³⁰ Counter-Memorial, para. 119.

³¹ Counter-Memorial, para. 120. See also Preparatory work of the General Assembly of the Government of France (full protocol dated June 15, 1987) and Act No. 87-552 of 10 July 1987, Official Journal of the Government of France, at 2379 (RL-0103). The original French version reads as follows:

69. The Respondent also relies on the following statement made in 1987 by France's Secretary of State before the National Assembly:

“Furthermore, only those lawsuits may be submitted to international arbitration, which concern dispossession measures, not all of the lawsuits that may arise between the investor and the hosting country. This phrase is the consequence of the reluctance of the Hungarian People's Republic to accept recourse to international arbitration.”³²

70. The Respondent refers also to the following extract from a report by the Hungarian Ministry of Finance from 1986:

“The disputes between the investor and the host country relating to expropriation or nationalization of investment, in the absence of an amicable settlement, are subject to arbitration

Thus, the Hungarians were successful in convincing the French that the investor may only seek the competence of the arbitration court against the Hungarian State in cases of expropriation or nationalization.”³³

“Habituellement, l'arbitrage porte sur toutes les clauses des accords d'investissements. Ici, il est limité aux différends relatifs aux mesures de dépossession, les autres litiges relevant des voies de recours internes. Cette particularité est d'une portée limitée en pratique, car seuls les différends ayant trait à une dépossession justifient le coût d'une procédure d'arbitrage international.”

³² Counter-Memorial, para. 121. See also Preparatory work of the General Assembly of the Government of France (full protocol dated June 15, 1987) and Act No. 87-552 of 10 July 1987 Official Journal of the Government of France, at 2379 (RL-0103). The original French version reads as follows:

“En outre, peuvent seuls être soumis à l'arbitrage international les litiges relatifs aux mesures de dépossession et non pas l'ensemble des litiges pouvant surgir entre un investisseur et l'Etat d'accueil. Cette formule est liée à la réticence de la République populaire de Hongrie à accepter le recours à l'arbitrage international.”

³³ Counter-Memorial, para. 122. See also Report on the negotiations relating to the Hungarian-French investment protection agreement, prepared by the Ministry of Finance of the People's Republic of Hungary on 7 July 1986 (RL-0092). The original Hungarian version reads as follows:

“A beruházó és a fogadó állam között a beruházás kisajátításával vagy államosításával kapcsolatos viták, a felek közötti békés rendezés hiányában, választottbírói ultra tartoznak. . . . Sikerült tehát elfogadtatni, hogy a Magyar állam ellen a beruházó kizárólag kisajátítás vagy államosítás esetén fordulhat választottbíróshoz.”

71. The Respondent asserts that the narrow dispute resolution clause in the Treaty is consistent with various other investment treaties that Hungary entered into during the late 1980s which likewise limit arbitration to expropriation claims.³⁴
72. The Respondent also notes that the Claimants ignored and failed to address the second paragraph of Article 9(2) of the Treaty, which limits the Tribunal’s jurisdiction only to claims stemming from alleged breaches of Article 5(2) of the Treaty.³⁵
73. In its Post-Hearing Brief, the Respondent rejects the Claimants’ argument that the *travaux préparatoires* presented by the Respondent refer only to Article 9(2) of the Treaty and say nothing about Article 4(1). In the Respondent’s view, this proves that the arbitration agreement is found only in Article 9(2) and not also in Article 4(1).³⁶ The Respondent highlights the absence of “any affirmative evidence that Hungary and France agreed to submit (or intended to submit in the future) non-expropriation claims to arbitration, or . . . that the Contracting Parties intended Article 4(1) to convey their intent to arbitrate any dispute arising by operation of the MFN clause.”³⁷ In the Respondent’s view, the following passage of the Memorandum from the Ministry of Foreign Affairs provides the opposite:

“arbitration procedures are generally applicable to all clauses of the agreement. In this case, it is limited to disputes regarding dispossession measures.”³⁸

³⁴ Counter-Memorial, paras. 123-124.

³⁵ Counter-Memorial, paras. 125-127.

³⁶ Respondent’s Post-Hearing Brief, para. 12.

³⁷ Respondent’s Post-Hearing Brief, para. 13.

³⁸ Respondent’s Post-Hearing Brief, para. 13; Memorandum from the Ministry of Foreign Affairs Regarding the Agreement with Hungary on the Reciprocal Promotion and Protection of Investments, Negotiations of July 1-2, Paris, dated 8 July 1986, RL-0130.

3. The scope of Article 4(1) of the Treaty

74. The Respondent argues that the Claimants “cannot use the MFN clause to subvert the will of the contracting parties to the BIT and expand the jurisdictional threshold of this Tribunal.”³⁹
75. In the Respondent’s view, “there is ample authority holding that the MFN clause cannot be used to expand the mandate of the tribunal to decide claims expressly excluded by the BIT”.⁴⁰ The Respondent relies on the decision on jurisdiction rendered in *Plama Consortium Limited v. Republic of Bulgaria*, and on the award rendered in *Telenor v. Hungary*.⁴¹ The Respondent further argues that “[t]ribunals in *Vladimir Berschader and Moïse Berschader v. The Russian Federation*, *Salini Construttori S.p.A. v. The Hashemite Kingdom of Jordan*, *Tza Yap Shum v. Republic of Peru*, *Renta 4 SVSA et al. v. The Russian Federation*, and *Austrian Airlines v. The Slovak Republic*, all declined to utilize the MFN clause to extend the dispute resolution provision as the Claimant seeks to do here”.⁴²
76. The Respondent draws a distinction “between application of the MFN clause to ‘substantive’ obligations versus those provisions relating to ‘jurisdiction’”.⁴³ In this regard, it relies on the following commentary by Zachary Douglas:

“Substantive obligations of investment protection are addressed to the contracting state parties. . . . The provisions conferring adjudicative power upon an international tribunal are addressed to that judicial organ once constituted and to the parties to the dispute that has been submitted to that judicial organ. Those disputing parties are not the contracting state parties to the investment treaty but the investor and the host state, which enter into a relationship of procedural equality before the international tribunal once a dispute has been submitted to it. In the context of adjudicating a dispute between an investor and the host state, how can it make sense for one disputing party to receive ‘MFN’ treatment from the other disputing party in respect of the rules for adjudicating the dispute?”

³⁹ Counter-Memorial, para. 129.

⁴⁰ Counter-Memorial, para. 130.

⁴¹ Counter-Memorial, paras. 131-132.

⁴² Counter-Memorial, para. 135.

⁴³ Counter-Memorial, para. 133.

The whole purpose of the equality of arms principle in international litigation is to ensure that the parties are treated the same. The equality of arms principle is not respected if one of the parties has the ability to adjust the rules relating to the jurisdiction of the tribunal or some other aspect of the procedure after a dispute has arisen.

One might also ask how a respondent state is expected to accord MFN treatment in relation to the jurisdictional mandate of the tribunal? Once a dispute with the investor has arisen, the only way for a respondent state to provide an investor that ‘treatment’ would be to waive any jurisdictional objections it may have upon receipt of the investor’s request for arbitration. Hence the *Maffezini* doctrine requires the respondent state to capitulate in respect of the investor’s demands concerning the adjudication of a specific dispute. That is hardly consistent with the principle of procedural equality.”⁴⁴

77. In the Respondent’s view, to ignore this distinction is to “impermissibly privilege the rights of investors over those of host States.”⁴⁵
78. The Respondent also relies on *Sanum v. Laos*. It asserts that the tribunal in that case “explained that to read into the treaty a dispute settlement provision to cover all protections under the treaty by virtue of the MFN clause when a treaty itself provides for very limited access to international arbitration would result in a substantial re-write of the treaty and an extension of the State parties’ consent to arbitration beyond what may be assumed to have been their intention.”⁴⁶
79. The Respondent further refers to the award on jurisdiction rendered in *RosInvest v. Russia*. It notes that the relevance of that decision in the instant case is “highly doubtful in light of the *RosInvest* tribunal’s explicit caution against any general application of its reasoning.”⁴⁷ It also notes that “the tribunal’s ruling that extended the application of the MFN clause to arbitration was only based on the reading of the specific MFN clause

⁴⁴ Counter-Memorial, para. 133. See also Zachary Douglas, *The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails*, 2 J. Int’l. Disp. Settlement, No. 1, 2011, 97, 104 (RL-0095).

⁴⁵ Counter-Memorial, para. 133.

⁴⁶ Counter-Memorial, para. 134; *Sanum Investments Limited v. The Government of the Lao People’s Democratic Republic*, PCA Case No. 2013-13, Award on Jurisdiction (December 13, 2013) (“*Sanum*”) (RL-0060).

⁴⁷ Counter-Memorial, para. 136.

found in Article 3(2) of the UK-Soviet bilateral investment treaty”, which “explicitly extended MFN protection not only to investments but also to investors.”⁴⁸ The Respondent asserts that the treaty language at issue in *RosInvest* “markedly differs” from the treaty language at issue in this case, “which only affords most favored nation ‘treatment’ to investors ‘in respect of their investments’.”⁴⁹ The Respondent finally asserts that “it is informative that, when interpreting Article 3(1) of the UK-Soviet bilateral investment treaty, which unlike Article 3(2), only afforded MFN protection to investments and not investors, the tribunal refused to permit the investor to import a clause regarding arbitration of a claim.”⁵⁰

80. On the basis of the above, the Respondent argues that the Claimants’ assertion that the MFN clause applies to extend access to arbitration must fail. In its view, “[a]s Hungary did not consent to arbitration of claims other than expropriation, Non-Expropriation Claims must be dismissed.”⁵¹
81. In its Post-Hearing Brief, the Respondent contends that the arbitration agreement “must only be found in the Hungary-France BIT, not in the Hungary-Lithuania and Hungary-Croatia BITs”. It asserts that the only arbitration agreement concerning investor claims is that in Article 9(2) of the Treaty, and that Article 4 says nothing about arbitration. In its view, “[i]t is not sufficient that exceedingly broad terms such as ‘activities’ and ‘treatment’ in Article 4(1) might possibly be read to include dispute resolution.”⁵² According to the Respondent, “if the MFN clause in the Hungary-France BIT is to be the channel by which the Claimants can take advantage of the dispute settlement provisions in the Hungary-Lithuania and Hungary-Croatia BITs, then the MFN clause must explicitly convey Hungary’s and France’s consent to arbitrate claims that would

⁴⁸ Counter-Memorial, para. 136.

⁴⁹ Counter-Memorial, para. 136.

⁵⁰ Counter-Memorial, para. 136.

⁵¹ Counter-Memorial, para. 137.

⁵² Respondent’s Post-Hearing Brief, para. 6.

be cognizable on account of the MFN clause”.⁵³ The Respondent argues that this is not the case.⁵⁴

82. The Respondent also asserts that its interpretation “in no way deprives the MFN clause of force and effect”, as “[a]n MFN clause (like that in Article 4) will still operate to extend and expand the substantive rights afforded by those provisions of the treaty like fair and equitable treatment and dispossession clauses that grant substantive rights.”⁵⁵

83. The Respondent further argues that the Claimants “will simply have to pursue non-expropriation claims in national courts and dispossession claims in arbitration (if it chooses to do so). There is nothing untoward or unfair about this dichotomy.”⁵⁶

B. The Claimants’ position

84. The Claimants assert that Article 4(1) of the Treaty forms part of the agreement between the contracting States and, like the other terms of the Treaty, must be interpreted in accordance with its “ordinary meaning”, in “context” and in light of the Treaty’s “object and purpose”.⁵⁷

85. In the Claimants’ view, the Respondent’s consent to international arbitration of “any dispute” with Lithuanian or Croatian investors constituted (and constitutes) more favourable treatment, and this treatment was automatically accorded to the Claimants by virtue of the MFN provisions contained in Article 4(1) of the Treaty.⁵⁸ On this basis, the Claimants assert that the Tribunal’s jurisdiction includes disputes concerning the Respondent’s breach of its obligation to accord the Claimants’ investments fair and

⁵³ Respondent’s Post-Hearing Brief, para. 4.

⁵⁴ Respondent’s Post-Hearing Brief, para. 5.

⁵⁵ Respondent’s Post-Hearing Brief, para. 8.

⁵⁶ Respondent’s Post-Hearing Brief, para. 8.

⁵⁷ Reply, para. 7.

⁵⁸ Reply, paras. 9, 92 and 146-152.

equitable treatment under Article 3 of the Treaty, and is not limited to the Respondent's breach of its obligations concerning expropriation under Article 5(2).⁵⁹

86. The Claimants argue that the Respondent's submission ignores the text of the Treaty (particularly Article 4(1)). They also asserts that the Respondent's reliance on "authority" is flawed because such "authority" is not supportive of its position, is not binding on the Tribunal, is not relevant to the analysis required by the Vienna Convention, and cannot be determinative here given the primacy of the text under the Vienna Convention.⁶⁰ Moreover, the Respondent's reliance on "authority" seeks to alter the bargain struck by the two States, which includes "a mechanism, located in the promise of MFN treatment . . . that ensures that the BIT continues to reflect each State's policy towards foreign investors."⁶¹

1. The meaning of Article 9(2) of the Treaty

87. The Claimants agree that Article 9(2) of the Treaty constitutes the Parties' consent to submit disputes over expropriation claims to the Centre.⁶² The Claimants reject, however, that the effect of Article 9(2) is to limit the Respondent's consent to arbitration to "cases involving purported expropriations".⁶³ The Claimants note that Article 9(2) is not the only relevant provision of the Treaty, and assert that the Respondent ignores the promise to grant the Claimants MFN treatment contained in Article 4(1).⁶⁴ In the Claimants' view, this provision has the effect of importing the more favourable dispute resolution provisions contained in the Respondent's bilateral investment treaties with Lithuania or Croatia into the Treaty.⁶⁵

⁵⁹ Reply, paras. 9 and 153-156.

⁶⁰ Reply, para. 10.

⁶¹ Reply, para. 11.

⁶² Reply, para. 29.

⁶³ Reply, para. 30.

⁶⁴ Reply, para. 30.

⁶⁵ Reply, para. 31.

2. The scope of Article 4(1) of the Treaty

a. Hungary's obligation to provide MFN treatment

88. According to the Claimants, the Treaty is intended to “create favorable conditions for French investments in Hungary and Hungarian investments in France”. They argue that the Treaty does this by granting investors a range of protections such as the right to fair and equitable treatment, the prohibition of unlawful expropriations and the possibility of settling investor-state disputes through ICSID arbitration.⁶⁶ The Claimants note that under Article 4(1) of the Treaty Hungary has also undertaken to grant French investors MFN treatment.⁶⁷
89. The Claimants assert that the MFN treatment is a means of providing for non-discrimination between one State and other States or their respective investors. The result is that the beneficiary State or its investors will always be entitled to any more favourable treatment granted to a third State or its investors.⁶⁸
90. According to the Claimants, Article 4(1) of the Treaty thus promises French investors treatment which is no less favourable than that guaranteed by Hungary to investors of any third State.⁶⁹ The Claimants affirm that the scope of the MFN clause is subject to

⁶⁶ Reply, para. 36.

⁶⁷ Reply, paras 37-39.

⁶⁸ Reply, paras. 40-42. The Claimants rely on the following commentary of the most favored nation standard by Georg Schwarzenberger:

“[T]he functions of the m.f.n. standard may be described as the elimination of discrimination, the correction of oversights and the adaptation of treaties to changing circumstances. The indefiniteness and elasticity of the standard and the automatic nature of its operation are characteristics of the standard which have made possible the continuity and universality of its application.” (CLA-0116)

The Claimants also rely on the following extract from the 1978 Draft Articles on most-favored-nation clauses:

“Most-favoured-nation treatment is treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that State, not less favourable than treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State.” (CLA-0117)

⁶⁹ Reply, para. 43.

only one limitation, namely that treatment granted under the comparator treaty concern the same matter (*ejusdem generis*) as that covered by the MFN clauses.⁷⁰

91. The Claimants contend that the beneficiary's entitlement to MFN treatment is immediate,⁷¹ and that it applies to both substantive and procedural rights, including the resolution of disputes.⁷² In relation to the effect of MFN clauses on consent to international arbitration, the Claimants rely on the following commentary by Stephan Schill:

“The underlying mechanism is thus one of automatic extension of the substance of the more favourable treatment (...). This means that the beneficiary under the basic treaty can rely on the more favourable treatment *ipso iure* without any additional act of transformation. (...) An investor covered by a BIT with an MFN clause therefore can immediately invoke the benefits granted to third-party nationals by another BIT of the host State; henceforth they govern as the relevant treatment imported by the MFN clause its relations with the host State. The technical effect of an MFN clauses [sic], provided that its scope applies to more favourable consent to arbitration, then is that the investor covered by the basic treaty can accept a more favorable offer to arbitrate made by the host State vis-à-vis investors covered under a different BIT.”⁷³

92. In the Claimants' view, MFN provisions ensure that the BIT continues to reflect each State's policy towards foreign investors. In this respect, the Claimants argue that Hungary's policy with respect to international arbitration has evolved, explaining that in the early 1990s Hungary began to accept wider dispute resolution clauses than those

⁷⁰ Reply, paras. 44 and 46. The Claimants rely on the following commentary by the International Law Commission to the 1978 “Draft Articles on Most-Favoured Nation Clauses”:

“[A] clause conferring most-favoured-nation rights in respect of a certain matter, or class of matter, can attract the rights conferred by other treaties (or unilateral acts) only in regard to the same matter or class of matter. (...) For instance, if the most-favoured-nation clause promises most-favoured-nation treatment solely for fish, such treatment cannot be claimed under the same clause for meat.” (CLA-0117)

⁷¹ Reply, para. 47.

⁷² Reply, paras. 46 and 48.

⁷³ Reply, para. 48; Stephan W. Schill, “Allocating Adjudicatory Authority: Most-Favoured-Nation Clauses as a Basis of Jurisdiction – A Reply to Zachary Douglas”, *Journal of International Dispute Management*, Vol. 2, No. 2 (2011).

accepted in the Treaty and in other bilateral investment treaties concluded earlier.⁷⁴ The Claimants invoke Hungary’s bilateral investment treaties with the Czech Republic, Croatia and Lithuania as examples of such evolution.⁷⁵

b. MFN treatment and dispute settlement

(i) Canons of interpretation

93. The Claimants argue that the scope of the MFN clause “is not a matter of ‘authority’” but rather one that “depends upon the wording of the relevant instrument(s)”.⁷⁶ According to the Claimants, “in principle MFN provisions are capable of applying to the dispute settlement provisions of BITs,”⁷⁷ and there is no general answer to the question as to whether the MFN clause applies to dispute settlement provisions. In the Claimants’ view, the relevant consideration is the text of the provisions under consideration.⁷⁸ The Claimants rely on the International Law Commission’s statement

⁷⁴ Reply, para. 49. *Szerződés a Magyar Népköztársaság és a Német Szövetségi Köztársaság között a beruházások elősegítéséről és kölcsönös védelméről* (Treaty Between the Hungarian People’s Republic and the Federal Republic of Germany on the Reciprocal Promotion and Protection of Investments), signed 30 April 1986, in force as of 7 November 1987, CLA-0123; *Accord entre l’Union économique belgo-luxembourgeoise et le Gouvernement de la République Populaire Hongroise concernant l’encouragement et la protection réciproques des investissements* (Agreement between the Belgium–Luxembourg Economic Union and the Government of the People’s Republic of Hungary on the Reciprocal Promotion and Protection of Investments), signed 14 May 1986, in force as of 23 September 1988, CLA-0124; *Agreement between the Czech Republic and the Republic of Hungary for the Promotion and Reciprocal Protection of Investments*, signed 14 January 1993, in force as of 25 May 1995, CLA-0125; *Agreement between the Republic of Croatia and the Republic of Hungary for the Promotion and Reciprocal Protection of Investments*, signed 15 May 1996, in force as of 1 March 2002, CLA-0005; and *Agreement between the Republic of Lithuania and the Republic of Hungary for the Promotion and Reciprocal Protection of Investments*, signed 25 May 1999, in force as of 20 May 2003, CLA-0006.

⁷⁵ Reply, para. 50.

⁷⁶ Reply, para. 53.

⁷⁷ Reply, para. 54. United Nations General Assembly, International Law Commission, *Final Report, Study Group on the Most-Favoured-Nation clause*, Sixty-seventh session, A/CN.4/L.852 (29 May 2015), para. 162 (CLA-0114).

⁷⁸ Reply, paras. 54-55. The Claimants also rely on the following observation by the tribunal in *RosInvestCo v. Russia*:

“[T]he main focus of [the tribunal’s] attention has to be not the policies which either one or the other Contracting Party brought to the negotiating table (and which might of course have been widely different from one another) but what they agreed on, as embodied in the terms of their treaty.” (CLA-0128, para. 49).

that “the ‘question . . . is truly one of treaty interpretation that can be answered only in respect of each particular case.’”⁷⁹

94. The Claimants note that Article 4(1) has to be interpreted in accordance with the general rule of interpretation established in Article 31 of the Vienna Convention. More precisely, the Claimants argue that “the crucial elements of the interpretative exercise in this instance are Articles 31(1) and 31(2)”, as there has been no suggestion that any of the specific considerations under Article 31(3) are relevant to the interpretation of Article 4(1) of the BIT and the Respondent has not submitted that the contracting States intended to give a “special meaning” to any of its terms.⁸⁰ In the Claimants’ view, “Articles 31(3) and 31(4) of the VCLT, therefore, are relevant only to the extent that Article 4(1) uses the terms defined in the BIT (such as ‘investor’ or ‘investment’).”⁸¹
95. The Claimants assert that the focus on the text “underpins the VCLT’s general rule”.⁸² The Claimants also contend that “a States’ consent to arbitration is not to be construed narrowly”.⁸³ According to the Claimants, contrary to the decisions in *Plama v. Bulgaria*, *Telenor v. Hungary*, and *Berschader v. Russia*, the “dispute resolution provisions are ‘subject to interpretation like any other provision of a treaty, neither more restrictive nor more liberal’.”⁸⁴

⁷⁹ Reply, para. 56. United Nations General Assembly, International Law Commission, *Final Report, Study Group on the Most-Favoured-Nation clause*, Sixty-seventh session, A/CN.4/L.852 (29 May 2015), para. 163 (CLA-0114).

⁸⁰ Reply, para. 59.

⁸¹ Reply, para. 59.

⁸² Reply, paras. 60-61. The Claimants also provide authorities regarding the interpretative process under Article 31 of the Vienna Convention. See *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on the Respondent’s Objections to Jurisdiction, 21 October 2005 (“*Aguas del Tunari*”), CLA-0131, para. 60. See also “Draft Articles on the Law of Treaties with commentaries,” Yearbook of the International Law Commission, Volume II (1966), commentary on Articles 27 and 28, para. 18:

“The Commission’s approach to treaty interpretation was on the basis that the text of the treaty must be presumed to be the authentic expression of the intentions of the parties, and that the elucidation of the meaning of the text rather than an investigation ab initio of the supposed intentions of the parties constitutes the object of interpretation.”

⁸³ Reply, para. 62.

⁸⁴ Reply, para. 63. See *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, 16 May 2006,

96. The Claimants affirm that the primacy of the text “explains the ‘[s]upplementary’ role accorded to Article 32” of the Vienna Convention.⁸⁵ In their view, in the present case the text of the Treaty suffices because Article 4(1) of the Treaty is clear and unambiguous, and the application of Article 31 leads to a result which is not manifestly absurd or unreasonable.⁸⁶
97. The Claimants further assert that the primacy of the text means that previous awards are of limited relevance and that the Tribunal is not bound by decisions of previous tribunals.⁸⁷ The Claimants note that those past awards concern differently-worded treaties, concluded in different circumstances and between different States, and that therefore they cannot be determinative for a tribunal’s decision in a particular case.⁸⁸ For the Claimants, it is Article 4(1) of the Treaty that should guide the Tribunal, not the “authority” invoked by the Respondent.⁸⁹

(“*Suez*”) CLA-0119, para. 64. In support of this assertion, the Claimants rely on the following passage of the decision in *Amco Asia Corp. (U.S.) and others v. Republic of Indonesia, ICSID Case No. ARB/81/1*, Decision on Jurisdiction, 25 September 1983 (“*Amco*”):

“Like any other conventions (...), a convention to arbitrate is not to be construed restrictively, nor, as a matter of fact, broadly or liberally. It is to be construed in a way which leads to find out and to respect the common will of the parties: such a method of interpretation is but the application of the fundamental principle *pacta sunt servanda*, a principle common, indeed, to all systems of internal law and to international law.” (CLA-0133, para. 14)

The Claimants also seek support for their proposition in the Separate Opinion of Judge Higgins in the *Oil Platforms (Islamic Republic of Iran v. United States of America)* case, which reads in relevant part as follows:

“It is clear from the jurisprudence of the Permanent Court and of the International Court that there is no rule that requires a restrictive interpretation of compromissory clauses. But equally, there is no evidence that the various exercises of jurisdiction by the two Courts really indicate a jurisdictional presumption in favour of the plaintiff. (...) The Court has no judicial policy of being either liberal or strict in deciding the scope of compromissory clauses: they are judicial decisions like any other.” (CLA-0134, para. 35)

⁸⁵ Reply, paras. 65-67.

⁸⁶ Reply, para. 69. In the same vein, the Claimants assert that “even if ‘supplementary means’ of interpretation were available (which they are not), there would be no justification for resorting to them.” (Reply, para. 69)

⁸⁷ Reply, paras. 70-71.

⁸⁸ Reply, para. 71.

⁸⁹ Reply, para. 72.

(ii) The text of Article 4(1) of the Treaty

98. According to the Claimants, the Respondent’s argument that the application of Article 4(1) of the Treaty to the settlement of investment disputes would “subvert the will of the contracting parties” ignores the general rule of interpretation established by the Vienna Convention and overlooks that Article 4(1) is an integral part of the “will of the contracting parties” embodied in the Treaty.⁹⁰
99. The Claimants note that Article 4(1) of the Treaty provides that “[t]he MFN obligation is owed to ‘investors (...) in respect of their investments and activities in connection with such investments’.”⁹¹ The Claimants assert that international arbitration is clearly an activity in connection with investments, and “treatment” is wide enough to cover dispute settlement.⁹² In the Claimants’ view, the MFN provision is formulated in extremely broad terms, and it is wide enough to cover the settlement of investment disputes.⁹³

(iii) The context of Article 4(1) of the Treaty

100. The Claimants note that Article 4(3) and 4(4) of the Treaty imposes two limitations on the application of the MFN provisions in Article 4(1), and dispute resolution is not among them.⁹⁴
101. In the Claimants’ view, the contracting States considered which issues should be excluded from the MFN protection and they chose not to exclude dispute resolution from the scope of Article 4(1). The Claimants argue that there is no reason to assume

⁹⁰ Reply, para. 73.

⁹¹ Reply, para. 78.

⁹² Reply, paras. 78-80. The Claimants rely on a number of decisions rendered by international tribunals, including *Renta 4 S.V.S.A. v. The Russian Federation*, Arbitration Institute of the Stockholm Chamber of Commerce, Award on Preliminary Objections, 20 March 2009 (“*Renta 4*”), RL-0055; *Suez*, CLA-0119; *Hochtief A.G. v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, (“*Hochtief*”) 24 October 2011, CLA-0127; and *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, 21 June 2011, CLA-0136.

⁹³ Reply, paras. 79-82.

⁹⁴ Reply, paras. 84-85 and 94.

that the contracting States forgot, or to imply a further restriction on the application of this clause.⁹⁵

102. The Claimants also assert that “[t]he presence of ‘specifically negotiated and deliberately narrowly tailored’ dispute resolution provisions does not preclude their circumvention by ‘means of a general MFN clause’.”⁹⁶ According to the Claimants, all the provisions in a treaty are specifically negotiated, including the MFN provision itself.⁹⁷ Moreover, the Claimants argue that “[b]y its very nature, the application of an MFN provision conflicts with, and overrides, the specifically-negotiated terms of the basic treaty in which it is found”.⁹⁸
103. According to the Claimants, the Respondent’s position is erroneous because it overlooks that the interpreter’s task is to ascertain the parties’ agreement as embodied in the treaty, which in the instant case means a broad MFN clause that does not exclude

⁹⁵ Reply, paras. 86 and 124.

⁹⁶ Reply, para. 88.

⁹⁷ Reply, para. 88.

⁹⁸ Reply, paras. 88-89 and 93. The Claimants seek support for their proposition in a number of authorities, including the following passage from the award on jurisdiction rendered in *RosInvest UK Ltd. v. Russian Federation*, Arbitration Institute of the Stockholm Chamber of Commerce Case No. V 079 / 2005, Award on Jurisdiction, October 2007 (“*RosInvest*”):

“[T]his is a normal result of the application of MFN clauses, the very character and intention of which is that protection not accepted in one treaty is widened by transferring the protection accorded in another treaty.” (CLA-0128, para. 131)

The Claimants also rely on the following passage of the Decision on the Objection to Jurisdiction in *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent, 3 July 2013:

“The MFN clause itself would be deprived of *effet utile* if it could never be used to override another provision of the treaty. Certainly, the principle of *ejusdem generis* restricts the application of an MFN clause to the displacement of clauses dealing with the same subject matter in other treaties of the same nature. But that principle is not offended by the use of an MFN clause to displace a provision from the dispute resolution article of one bilateral investment treaty with a corresponding provision from the dispute resolution article of another bilateral investment treaty signed by the same State.” (CLA-0110, paras. 51 and 54)

dispute settlement.⁹⁹ The Claimants also affirm that the Respondent’s position is erroneous because it misunderstands the nature of the MFN mechanism.¹⁰⁰

104. The Claimants further rely on the title and the preamble of the Treaty. They argue that the emphasis on the “encouragement and protection” of investments does not equate to “a presumption that the investor is right”.¹⁰¹ In their view, while the preamble does not dictate the meaning of Article 4(1), the object and purpose of the Treaty should “inform the determination of the ‘ordinary meaning’ of Article 4(1)”.¹⁰² They argue that in the instant case the preamble does confirm “the breadth of the ‘ordinary meaning’ to be given to the terms of Article 4(1).”¹⁰³ The Claimants argue that international arbitration is an integral element of the encouragement and protection of investments.¹⁰⁴

⁹⁹ Reply, paras. 88-89.

¹⁰⁰ Reply, para. 91. In making this statement, the Claimants’ rely on the following passage of the award on preliminary objections rendered in the *Renta 4* case:

“It is not convincing for a State to argue in general terms that it accepted a particular ‘system of arbitration’ with respect to nationals of one country but did not so consent with respect to nationals of another. The extension of commitments is in the very nature of MFN clauses. Drafters wishing to do so would have little difficulty in defining restrictions that would go further than the general *esjudem* [sic] *generis* constraint. Some BITs exhaustively enumerate acceptable MFN extensions. Others explicitly exclude dispute resolution from the reach of MFN provisions. Absent such stipulations it is the task of international arbitral tribunals to determine whether arbitration clauses in comparator treaties in fact comport more favoured treatment.” (RL-0055, para. 92)

¹⁰¹ Reply, para. 99.

¹⁰² Reply, paras. 99-100.

¹⁰³ Reply, paras. 99.

¹⁰⁴ Reply, para. 99. In support of their proposition, the Claimants rely on the following decisions and awards: *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000 (“*Maffezini*”), CLA-0126, para. 54; *Gas Natural SDG S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, 17 June 2005, CLA-0138, paras. 29 and 49; *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, CLA-0110, para. 102; *Hochtief*, CLA-0127; *Renta 4 Award on Preliminary Objections*, RL-0055, para. 100; and *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Decision on Jurisdiction, 3 July 2013, CLA-0137, para. 63.

(iv) Article 32 of the Vienna Convention

105. According to the Claimants, there is no reason to refer to Article 32 of the Vienna Convention because the text of Article 4(1) of the Treaty is clear and unambiguous, and it leads to a result that is not manifestly absurd or unreasonable.¹⁰⁵
106. The Claimants assert that the Respondent relies on supplementary means of interpretation regarding the “plain meaning” of Article 9(2) of the Treaty – not with respect to Article 4(1) – and that these supplementary sources are “of no moment to the interpretation of Article 4(1)” for the following reasons: (i) they concern Article 9(2) of the Treaty; (ii) the Respondent has failed to explain how its invocation of “supplementary sources” fits into the interpretative process established under the Vienna Convention; (iii) the Respondent has not demonstrated that the documents cited could constitute “supplementary means” within the meaning of Article 32 of the Vienna Convention; and (iv) the Respondent has not applied Article 31 because it has not sought to interpret Article 4(1) of the Treaty at all, and therefore it is precluded from invoking “supplementary means” by the very terms of Article 32 of the Vienna Convention.¹⁰⁶

c. The legal authorities invoked by the Respondent

107. The Claimants argue that the Respondent’s refusal to engage with the language of the BIT’s MFN provisions fatally undermines its case. Moreover, the Claimants contend that the Respondent compounds this error by misunderstanding and misrepresenting the nature and the relevance of the “authority” on which it relies.¹⁰⁷
108. The Claimants assert that the Respondent’s suggestion that there is a “well-established line of authority” establishing that Article 4(1) cannot apply to dispute settlement is incorrect, as the application of MFN provisions to dispute settlement is an unsettled area of investment law.¹⁰⁸ The Claimants also explain that the Respondent’s basic

¹⁰⁵ Reply, para. 101.

¹⁰⁶ Reply, paras. 102-103.

¹⁰⁷ Reply, paras. 104-105.

¹⁰⁸ Reply, paras. 106-107.

premise is flawed because the arbitration of claims under Article 3 is not “expressly excluded” by Article 9(2) of the Treaty.¹⁰⁹ In their view, the arbitration of FET claims is not expressly provided for in Article 9(2), but the mechanism contained in Article 4(1) of the Treaty permits their arbitration if Hungary has agreed to arbitrate such claims with the investors of a third State. The Claimants argue that this condition has now been met.¹¹⁰

109. The Claimants also assert that the awards in *Plama*, *Telenor*, *Berschader*, *Salini*, *Austrian Airlines* and *Tza Yap Shum*, on which the Respondent relies, are founded on a fundamental error of law.¹¹¹ According to the Claimants, the decisions in *Plama*, *Telenor* and *Berschader* are founded on the presumption “that a State’s consent to arbitration is to be construed restrictively” and that therefore an MFN provision does not incorporate settlement provisions in another treaty unless the MFN provision in the basic treaty leaves no doubt that the contracting parties intended to incorporate them.¹¹² The Claimants also explain that the decisions in *Austrian Airlines*, *Tza Yap Shum* and *Salini*, misunderstand the nature of the MFN mechanism and overlook the fact that all articles of a treaty are to be considered specifically-negotiated.¹¹³ In the Claimants’

¹⁰⁹ Reply, paras 108-109; Counter-Memorial, para. 130.

¹¹⁰ Reply, para. 109.

¹¹¹ Reply, para. 110.

¹¹² Reply, para. 111. The Claimants rely on the following passage of the decision in *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005 (“*Plama*”):

“An MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them.” (RL-0052, para. 223)

¹¹³ Reply, paras. 113-116. In support of their proposition, the Claimants rely on the following passage of Judge Brower’s separate opinion in *Austrian Airlines v. Slovak Republic*, UNCITRAL, Final Award, October 9, 2009 (“*Austrian Airlines*”):

“It is not appropriate to consider provisions as ‘context’ for interpreting an MFN clause that are less favorable than provisions in third-State treaties to which Claimant claims access. If every time an MFN clause were invoked it were to be read together with the treaty provision which the MFN clause is alleged to circumvent, such a clause might never be given any effect; it would be largely vitiated by that which it seeks to void, modify or expand by importing more favorable treatment from Respondent’s third-State treaties. The treatment under a BIT that is possibly less favorable than that provided in third-State treaties is simply not the relevant ‘context’ for interpreting the subject matter of the MFN clause. In consequence, the scope of the jurisdictional provisions in the

view, “absent express wording to that effect, there is no justification for privileging a particular term of a treaty over an MFN provision on the basis that the former is specifically-negotiated.”¹¹⁴ The Claimants assert that the approach followed by these tribunals is not consistent with the general rule of interpretation under the Vienna Convention, as “it is the text of the MFN provisions contained in the relevant treaty, and not the contracting States’ ‘intention as expressed in [the dispute resolution clause]’, that is relevant.”¹¹⁵

110. The Claimants further argue that Professor Douglas’s argument regarding the application of MFN clauses to dispute resolution is flawed.¹¹⁶ According to the Claimants, “the application of MFN treatment to dispute resolution does not ‘adjust the rules relating to the jurisdiction of the tribunal or some other aspect of the procedure after a dispute has arisen’.” In their view, the operation of an MFN provision is immediate: once the Respondent has granted more favourable treatment to Croatian and Lithuanian investors in respect of dispute settlement, the Claimants are entitled to the same treatment. The Claimants assert that there is nothing inherently unfair or unreasonable about this, and this does not involve an adjustment of the rules relating to jurisdiction or procedure.¹¹⁷ The Claimants also affirm that according an investor MFN treatment does not require a State to waive any jurisdictional objections it might have upon receipt of the investor’s request for arbitration, because the investor must be entitled to rely on the MFN provision and must comply with any limitations imposed by the dispute resolution provisions in the comparator treaty.¹¹⁸

111. With respect to Professor Douglas’s analysis, the Claimants also explain that “[t]he suggestion that the 2000 decision in *Maffezini* appeared in a vacuum is misleading”, as

Treaty is irrelevant for interpreting the subject matter of Article 3(1) [i.e. the MFN clause], in particular the meaning of the word ‘treatment.’” (RL-0011, para. 136)

¹¹⁴ Reply, para. 114.

¹¹⁵ Reply, paras. 117-118.

¹¹⁶ Reply, paras. 119-120.

¹¹⁷ Reply, para. 120.

¹¹⁸ Reply, para. 121.

the 1991 UK model bilateral investment treaty already provided expressly that MFN treatment should apply to dispute resolution.¹¹⁹ They further argue that “the introduction of Professor Douglas’ rigid distinction between ‘substantive’ and ‘procedural’ rights would infringe upon the agreement embodied in the BIT.”¹²⁰

112. The Claimants also assert that the Respondent misrepresents the awards in *Sanum* and *Renta 4*. With respect to the decision in *Sanum*, the Claimants explain that the MFN clause was expressly limited to FET and the provision of “protection”. In the Claimants’ view, the decision in that case was “the product of the contradiction in the claimant’s submission and the restricted nature of the MFN and ‘protection’ clauses in the relevant treaty.”¹²¹ With respect to the decision in *Renta 4*, the Claimants explain that the MFN obligation in that case was limited to fair and equitable treatment.¹²² Indeed, the Claimants explain that the majority of the tribunal agreed that an MFN provision may apply to dispute settlement, and stated that whether this is in fact the case will depend upon the exact terms of the MFN clause.¹²³
113. The Claimants further argue that the Respondent misunderstands the significance of the decision in *RosInvest*. The Claimants explain that the Respondent’s quotation of Article 4(1) of the Treaty at para. 136 of its Counter-Memorial “ignores the fact that ‘investors’ enjoy MFN treatment in respect of their ‘investments’ and ‘activities in connection with such investments’”, which in the Claimants’ view includes dispute settlement.¹²⁴ The Claimants also assert that the Respondent ignores that “Article 4(1) of the BIT refers to any activities in connection with investments”, while Article 3(2)

¹¹⁹ Reply, paras. 122-124.

¹²⁰ Reply, paras. 125-127.

¹²¹ Reply, paras. 130-132.

¹²² Reply, paras. 133-134.

¹²³ Reply, paras. 135-136. See also *Renta 4*, which reads in relevant part as follows:

“They agree that ‘more favourable’ may in principle include accessibility to international fora. Ultimately however their view is that the terms of the Spanish BIT restrict MFN treatment to the realm of FET as understood in international law.” (RL-0055, para. 119)

¹²⁴ Reply, paras. 139-141.

of the UK-Soviet BIT considered in *RosInvest* was not unqualified and was in fact narrower than Article 4(1) of the BIT, as it granted investors MFN treatment “as regards their management, maintenance, use, enjoyment or disposal of their investments”.¹²⁵ The Claimants argue that the decision in *RosInvest* relates to a different treaty and is not determinative here.¹²⁶ However, they note that the *RosInvest* decision “is authority for the proposition that, in certain circumstances, a tribunal’s jurisdiction may be extended through the application of an MFN clause, and that this is unaffected by the presence of express limitations to the jurisdiction of the tribunal under the arbitration agreement in the basic treaty”.¹²⁷

C. The Parties’ position regarding the Tribunal’s questions

114. As explained above, in Procedural Order No. 3 the Tribunal asked the Parties to address a number of questions in their Post-Hearing Briefs. The Parties’ position on these questions, as expressed in their respective Post-Hearing Briefs submitted on 5 February 2016, are summarized in turn below.

1. Claimants indicated that there were reasons why they were relying on the Hungary–Lithuania and Croatia–Hungary BITs, implying that their provisions were most favorable for Claimants. Why, specifically, are Claimants relying on these two BITs? Are there any other specific Hungary BITs that Claimants rely upon? If so, for what reasons?

115. The Claimants explain that they now rely solely on the more-favorable dispute settlement provisions contained in the Lithuania-Hungary BIT. According to the Claimants, they rely on this BIT because: (a) it “contains consent to the submission of

¹²⁵ Reply, para. 142.

¹²⁶ Reply, para. 143.

¹²⁷ Reply, para. 143. The passage from the *RosInvest* decision relied upon by the Claimants reads in relevant part as follows:

“While indeed the application of the MFN clause of Article 3 widens the scope of Article 8 and thus is in conflict with its limitation, this is a normal result of the application of MFN clauses, the very character and intention of which is that protection not accepted in one treaty is widened by transferring the protection accorded in another treaty.” (CLA-0128, para. 131)

‘[a]ny dispute’ to arbitration”; (b) it “does not impose a requirement to exhaust local remedies”; and (c) it “does not contain a ‘fork-in-the-road’ provision.”¹²⁸

116. The Claimants clarify that they do not rely on the FET provisions in the Hungary-Lithuania BIT, and that they rely solely on the more favorable treatment granted to Lithuanian investors under Article 8 of the Lithuania-Hungary BIT, which refers to dispute resolution.¹²⁹
117. The Respondent also submitted comments regarding this question. In its view, the “Claimants contend that the MFN serves as a drafting tool that automatically amends the standing offer in the Treaty so that, when it comes time, Claimants may simply accept the amended standing offer, which necessarily includes the more favored treatment”.¹³⁰ This “presupposes that what constitutes ‘more’ is an objective and singular standard” capable of being known at a point in time.¹³¹ The Respondent argues that this is not the case. In its view, it would be “an uncertain, ambiguous and versatile consent depending on the subjective views of the investor.”¹³² The Respondent notes that the table produced pursuant to paragraph 2.2 of Procedural Order No. 3 shows that there are numerous formulations as to what might be the “most favored treatment” let alone the “more favored treatment”, and each would be assessed from the particular perspective of the individual claimant.¹³³

2. Is the right to pursue dispute settlement proceedings in the France–Hungary BIT / in any BIT a self-standing right, independent of any of the other provisions of the treaty, or is it a

¹²⁸ Claimants’ Post-Hearing Brief, para. 7.

¹²⁹ Claimants’ Post-Hearing Brief, para. 8.

¹³⁰ Respondent’s Post-Hearing Brief, para. 31.

¹³¹ Respondent’s Post-Hearing Brief, para. 31.

¹³² Respondent’s Post-Hearing Brief, para. 32.

¹³³ Respondent’s Post-Hearing Brief, para. 32.

right that is ancillary to a substantive right set out elsewhere in the treaty?

118. According to the Respondent, Article 9(2) of the Treaty “is a stand-alone right that is governed only by its terms and not by other provisions of the France-Hungary BIT.”¹³⁴ This conclusion is, in the Respondent’s view, consistent with the principle that arbitration agreements are severable from the contracts or treaties in which they are found.¹³⁵
119. The Respondent asserts that the arbitration right in Article 9(2) is not “subordinate to those provisions of the . . . BIT that confer substantive rights”.¹³⁶ In its view, “the right to pursue dispute settlement proceedings is not something ‘which could be inferred from obligations assumed’ elsewhere in the BIT or which otherwise arises therefrom.”¹³⁷ The Respondent contends that the Claimants “are incorrect to ground

¹³⁴ Respondent’s Post-Hearing Brief, para. 15.

¹³⁵ Respondent’s Post-Hearing Brief, para. 15.

¹³⁶ Respondent’s Post-Hearing Brief, para. 16.

¹³⁷ Respondent’s Post-Hearing Brief, paras. 17 and 20. See also Justice Winston Anderson, JCCJ, *The Role of the Caribbean Court of justice in the human rights Adjudication: International Treaty Law Dimensions*, 21 J. Transnat’l Law & Policy 8 (2011-2012), RL-0133. The Respondent also relies on the following passage of Professor Stern’s opinion of 21 June 2011 in *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17:

“[There is a] profound difference between the national legal orders and the international legal order. On the national level, when there exists a substantive right, there is always automatically a means to protect such a right through the jurisdictional system. In other words, on the national level, jurisdictional treatment is inherent in substantive treatment. In contrast, on the international level, most rights cannot be enforced through a jurisdictional process, it is only when, exceptionally, the State has given its consent – consent to other States for accepting the jurisdiction of the ICJ or consent to foreign investors for accepting international arbitration – that such a ‘jurisdictional treatment’ complements the substantive treatment granted by the international rules. Contrary to the situation existing in the national legal orders, the jurisdictional treatment is never inherent in the substantive treatment in on the international level.” (RL-0137, para. 45)

The Respondent further relies on the following passage in the decision made by the International Court of Justice in *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda)*, 2006 ICJ 6, 65 (February 6):

“The Court observes . . . “the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things” (East Timor (Portugal v. Australia), Judgement I.C.J. report, 1995, p. 102, para. 29) and that the mere fact that rights and obligations *erga omnes* may be at issue in a dispute would not give the Court jurisdiction to entertain that dispute. That same applies to the relationship between peremptory norms of general international law (*jus cogens*) and the establishment of the Court’s jurisdiction: the fact that a dispute relates to compliance with a norm having such a

the purported right to arbitrate the non-expropriation claims in the assertion that the ability to enforce a right is ‘an integral part’ of the protection afforded by any substantive right (here MFN treatment)”.¹³⁸

120. The Respondent further argues that the Claimants give a different and contradictory meaning to the word “treatment” in Article 3 and in Article 4(1) of the Treaty, as they are not seeking a more favorable right to fair and equitable treatment but, rather, “a ‘more’ favorable right to arbitrate.”¹³⁹ The Respondent asserts that there is a fundamental disconnect between how the Claimants rely on the MFN clause (arguing that they are entitled to legal protection of a right) and what they are actually claiming through the MFN clause (i.e., a right).¹⁴⁰

121. The Respondent thus contends that Article 4(1) of the Treaty is unavailing to the Claimants because: (a) it does not convey explicit consent to arbitrate claims that are not dispossession claims; and (b) it cannot be transformed into a *de facto* arbitration agreement because “a promise to extend the same treatment accorded to investors in the most favored nation is *not* an implicit promise to arbitrate”.¹⁴¹ The Respondent adds that, in the MFN clause, Hungary promised “only to enhance the investors’ substantive rights—such as the right to fair and equitable treatment. But Hungary did not thereby also promise to arbitrate claims that it expressly said in Article 9(2) it would not arbitrate.”¹⁴²

character ... cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute. Under the Court’s Statute that jurisdiction is always based on the consent of the parties.” (RL-0135, p. 32)

¹³⁸ Respondent’s Post-Hearing Brief, para. 20.

¹³⁹ Respondent’s Post-Hearing Brief, paras. 22-23.

¹⁴⁰ Respondent’s Post-Hearing Brief, para. 23.

¹⁴¹ Respondent’s Post-Hearing Brief, para. 24.

¹⁴² Respondent’s Post-Hearing Brief, para. 24.

122. According to the Claimants, the distinction between “self-standing” and “ancillary” rights¹⁴³ is not normative. In their view, this is important for three reasons: (a) a rigid distinction does not exist, as a right may be self-standing in one context and ancillary in another, or self-standing and at the same time ancillary to another right;¹⁴⁴ (b) the distinction does not necessarily have legal implications, as independently of how the right to pursue dispute settlement is classified, the Tribunal has jurisdiction over the Claimants’ claims under Article 3 of the Treaty;¹⁴⁵ and (c) it cannot be assumed that a particular provision of a BIT relates solely to “self-standing” or “ancillary” rights, and absent wording to that effect such distinction cannot (and should not) be read into the terms of a treaty.¹⁴⁶
123. The Claimants contend that this is particularly relevant to the interpretation of Article 4(1) of the Treaty, as it covers “treatment” in respect of “investments and activities in connection with such investments” without distinguishing between “self-standing” and “ancillary” rights. In their view, the promise of MFN treatment applies to all rights, including in respect of dispute settlement.¹⁴⁷
124. The Claimants argue that the right to pursue dispute settlement proceedings is capable of being “self-standing” and that there is nothing “ancillary” about this right.¹⁴⁸ In their view, this does not mean that dispute settlement rights cannot also form part of a bundle

¹⁴³ The Claimants understand “self-standing” rights as the rights capable of existing independently of other rights, and “ancillary” rights as those necessary to, or dependent upon, the existence or exercise of a separate right (Claimants’ Post-Hearing Brief, para. 10).

¹⁴⁴ Claimants’ Post-Hearing Brief, para. 11.

¹⁴⁵ Claimants’ Post-Hearing Brief, para. 13.

¹⁴⁶ Claimants’ Post-Hearing Brief, paras. 14 and 21.

¹⁴⁷ Claimants’ Post-Hearing Brief, para. 15.

¹⁴⁸ Claimants’ Post-Hearing Brief, para. 17-19. The Claimants also assert that the possibility for an investor to invoke the right to pursue dispute settlement can be exercised separately from the other provisions of the treaty, something which they say was recognized by the Tribunal in *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, CLA-0021, para. 55.

of rights but, rather, that the right to pursue dispute settlement is not intrinsically ancillary to a substantive right set out elsewhere in the treaty.¹⁴⁹

3. If it is an ancillary right, does this have any implication for Claimants’ reliance on the Hungary–Lithuania and Croatia–Hungary BITs to found the right to pursue arbitration in respect of its FET claims?

125. The Respondent submits that the right to pursue dispute settlement proceedings is not an ancillary right, but rather an independent right that must be explicitly agreed between the contracting parties.¹⁵⁰ Further, the Respondent contends that whether the right to pursue dispute settlement proceedings is characterized as “independent” or “ancillary”, the right must be in the basic treaty, whereas here the BIT affords no right to arbitrate non-dispossession claims. In the Respondent’s view, the “Claimants cannot rely on the Hungary-Lithuania and/or the Croatia-Hungary BITs to ‘create a right to go to arbitration where none otherwise exists under the [basic BIT].’”¹⁵¹

126. The Claimants argue that an MFN clause may apply to “treatment” in respect of dispute resolution, irrespective of how the relevant rights are classified.¹⁵² What matters,

¹⁴⁹ Claimants’ Post-Hearing Brief, para. 20. The Claimants also rely on the following passage of the decision in *RosInvest*, to assert that the right to pursue dispute resolution is a protection like any other:

“[i]f this effect [the expansion of rights through an MFN clause] is generally accepted in the context of substantive protection, the Tribunal sees no reason not to accept it in the context of procedural clauses such as arbitration clauses. Quite the contrary, it could be argued that, if it applies to substantive protection, then it should apply even more to “only” procedural protection. However, the Tribunal feels that this latter argument cannot be considered as decisive, but that rather, as argued further above, an arbitration clause, at least in the context of expropriation, is of the same protective value as any substantive protection afforded by applicable provisions (...).” (*RosInvest*, para. 132, CLA-0128)

¹⁵⁰ Respondent’s Post-Hearing Brief, para. 25.

¹⁵¹ Respondent’s Post-Hearing Brief, para. 26. The Respondent relies on *Hochtief*, CLA-0127, para. 79.

¹⁵² Claimants’ Post-Hearing Brief, paras. 23-25. In making this argument, the Claimants rely on the following passage of the Final Report of the ILC’s Study Group on the Most-Favored Nation clause:

“...in principle MFN provisions are capable of applying to the dispute settlement provisions of BITs. (...) The point is essentially one of party autonomy; the parties to a BIT can, if they wish, include the conditions for access to dispute settlement within the scope of coverage of an MFN provision. The question in each case is whether they have done so.

163. In this sense, the question is truly one of treaty interpretation that can be answered only in respect of each particular case.” (United Nations General Assembly,

according to the Claimants, is the terms of the treaty. They assert that whether the MFN clause applies to dispute settlement in this instance turns on the correct interpretation of Article 4(1) of the Treaty, which is not affected by the characterization of the rights under consideration.¹⁵³

127. The Claimants also assert that the MFN provision found in Article 4(1) of the Treaty must be interpreted in accordance with the VCLT’s “general rule of interpretation”. In the Claimants’ view, “this rule applies to all provisions of a treaty, without distinction, and the approach does not vary according to the characterization of the provisions (or rights) under consideration.”¹⁵⁴ The Claimants assert that the promise to accord them MFN treatment is formulated in broad and far-reaching terms, that the terms “treatment” and “activities” are unqualified, and that there is no distinction between “treatment” or “activities” in respect of “self-standing” rights, and “treatment” or “activities” in respect of “ancillary” rights. According to the Claimants, “[j]ust as there is no justification for artificially excluding consent to arbitration from the scope of Article 4(1), there is no justification for limiting its application to ‘self-standing’ (or ‘ancillary’) rights.”¹⁵⁵
128. The Claimants further argue that the reference to “[i]n its territory” in Article 4(1) of the Treaty refers to the territory where the Respondent has control, and in which the investment was made. It does not, in their view, automatically preclude MFN treatment in respect of international arbitration.¹⁵⁶

International Law Commission, Final Report, Study Group on the Most-Favoured-Nation clause, Sixty-seventh session, A/CN.4/L.852 (29 May 2015), paras. 162-163, CLA-0114)

¹⁵³ Claimants’ Post-Hearing Brief, para. 25.

¹⁵⁴ Claimants’ Post-Hearing Brief, para. 26.

¹⁵⁵ Claimants’ Post-Hearing Brief, paras. 27-28 and 32.

¹⁵⁶ Claimants’ Post-Hearing Brief, paras. 29-30. The Claimants support their argument on the Model Agreement of the Government of the United Kingdom of Great Britain and Northern Ireland for the Promotion and Protection of Investments, 1991, Article 3(3), CLA-0141, which contains an MFN clause which is expressly stated to apply to the resolution of disputes through international arbitration. The Claimants also rely on the exceptions established in Article 13 of the Jordan-Hungary and Azerbaijan-Hungary BITs.

129. The Claimants also contend that “even if one assumes that a right to pursue dispute settlement can only be considered alongside the ‘substantive right’ to which it is ‘ancillary’, the outcome would be the same. The Tribunal would still have jurisdiction over the Claimants’ claims under Article 3 of the France-Hungary BIT.”¹⁵⁷ In their view, the Respondent has still granted Lithuanian investors more favorable treatment. They affirm that the only difference is that the treatment “would be articulated in terms of FET (and the rights ancillary to it) rather than dispute resolution”, but the outcome is the same.¹⁵⁸

4. On the assumption, *arguendo*, that an MFN clause in a BIT could operate to import into the treaty a dispute settlement clause from another BIT, are there any limitations on what elements of the dispute settlement modalities can be imported?

130. According to the Respondent, in the event that an MFN clause were used to import a dispute settlement clause, “it could not incorporate those elements of the dispute settlement modalities that would ‘create’ arbitral jurisdiction.”¹⁵⁹ The Respondent relies on the decision rendered in *Hochtief* to assert that “the MFN clause ‘can only operate in regard to the subject-matter which the two States had in mind when they inserted the clause in their treaty.’”¹⁶⁰ The Respondent further argues that a similar limitation was recognized by the Tribunal in *Teinver*,¹⁶¹ and that this limitation is also consistent with the reasoning in *RosInvest*, “where the Tribunal expressly limited its consideration of the application of the MFN clause to arbitration regarding

¹⁵⁷ Claimants’ Post-Hearing Brief, para. 35.

¹⁵⁸ Claimants’ Post-Hearing Brief, paras. 39-40.

¹⁵⁹ Respondent’s Post-Hearing Brief, para. 27.

¹⁶⁰ Respondent’s Post-Hearing Brief, para. 28. The Respondent also relies on the following passage of the decision in *Hochtief*:

“[I]t cannot be assumed that [the parties to the BIT] intended that the MFN clause should create wholly new rights where none otherwise existed . . . The MFN clause stipulates a standard of treatment and defines it according to the treatment of third parties. The reference is to a standard of treatment accorded to third parties, not to the extent of the legal rights of third parties.” (CLA-0127, para. 81)

¹⁶¹ Respondent’s Post-Hearing Brief, para. 29. *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012 (“*Teinver*”), RL-0143, paras. 181-82.

expropriation, i.e., it limited its consideration of the proper application of the MFN clause to that area for which it had admitted jurisdiction.”¹⁶²

131. The Claimants assert that the operation of an MFN clause is subject to two limitations. First, the *ejusdem generis* rule, which requires that the treatment in the basic treaty and the comparator treaty concern the same matter.¹⁶³ Second, the terms of the relevant provisions limit what elements of the dispute settlement modalities could be imported.¹⁶⁴ The Claimants explain that they “do not rely upon ‘elements of the dispute settlement modalities’ found in the Lithuania-Hungary BIT”. They assert that, in accordance with Article 4(1) of the Treaty, they rely upon the more favorable treatment accorded to Lithuanian investors under Article 8 of the Lithuania-Hungary BIT in its entirety.¹⁶⁵ In their view, “[b]y consenting to the arbitration of FET disputes with Lithuanian investors, the Respondent also consented to the arbitration of FET disputes with the Claimants.”¹⁶⁶
132. The Claimants also explain that, in order to rely on the MFN provision of a BIT, an investor must demonstrate that the treatment accorded to third State investors is objectively more favorable.¹⁶⁷ In their view, the existence of the choice to submit a dispute to an international forum is objectively more favorable than its absence.¹⁶⁸
133. The Claimants explain that the MFN standard is intended to ensure the elimination of discrimination, the correction of oversights and the adaptation of treaties to changing circumstances.¹⁶⁹ They further argue that the application of the MFN standard is automatic and immediate, and does not permit the imposition of artificial limits on its

¹⁶² Respondent’s Post-Hearing Brief, para. 29.

¹⁶³ Claimants’ Post-Hearing Brief, para. 43.

¹⁶⁴ Claimants’ Post-Hearing Brief, para. 44.

¹⁶⁵ Claimants’ Post-Hearing Brief, para. 46.

¹⁶⁶ Claimants’ Post-Hearing Brief, para. 46.

¹⁶⁷ Claimants’ Post-Hearing Brief, para. 48.

¹⁶⁸ Claimants’ Post-Hearing Brief, para. 49.

¹⁶⁹ Claimants’ Post-Hearing Brief, para. 53. Georg Schwarzenberger, “The Most-Favoured-Nation Standard in British State Practice”, *British Year Book of International Law*, Vol. 22, p. 96 (1945), p. 100, CLA-0116.

operation.¹⁷⁰ The Claimants rely on the decision in *RosInvest* to assert that “[t]he interpreter is not permitted to second-guess the contracting-States’ policy decisions.”¹⁷¹ In the Claimants’ view, this means that there is no principle that provisions that embody a state’s consent to arbitration must be strictly interpreted, and that contrary to the Respondent’s submission, the wording of the text is not just relevant but dispositive.¹⁷²

134. The Claimants also reject the Respondent’s submission that “an MFN provision cannot be used to create a new right or to attract from the comparator treaty a right that does not exist in the basic treaty.”¹⁷³ They argue as follows: (a) the only authority cited by the Respondent in support of this submission expressly avoided ruling on the issue currently before the Tribunal;¹⁷⁴ (b) the only inherent limitation to the operation of an MFN provision is the *ejusdem generis* rule;¹⁷⁵ and (c) it is well established that an MFN clause may attract a right that does not exist in the basic treaty.¹⁷⁶

VI. THE TRIBUNAL’S CONSIDERATIONS AND CONCLUSIONS

A. Introductory note

135. The Tribunal has given consideration to the extensive factual and legal arguments presented by the Parties in their written and oral submissions, all of which the Tribunal has found helpful. In this Decision, the Tribunal discusses the arguments of the Parties

¹⁷⁰ Claimants’ Post-Hearing Brief, para. 53.

¹⁷¹ Claimants’ Post-Hearing Brief, para. 54. The Claimants rely on the following passage:

“the main focus of [the tribunal’s] attention has to be not the policies which either one or the other Contracting Party brought to the negotiating table (and which might of course have been widely different from one another) but what they agreed on, as embodied in the terms of their treaty.”

The Claimants also rely on *Renta 4*, para. 93, RL-0055.

¹⁷² Claimants’ Post-Hearing Brief, paras. 56, 59 and 61-62.

¹⁷³ Claimants’ Post-Hearing Brief, para. 63.

¹⁷⁴ Claimants’ Post-Hearing Brief, para. 64. *Hochtief*, para. 91.

¹⁷⁵ Claimants’ Post-Hearing Brief, para. 64.

¹⁷⁶ Claimants’ Post-Hearing Brief, para. 64. The Claimants also rely on *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award (August 27, 2009), RL-0013, paras. 153-160.

it considers most relevant for its decisions. The Tribunal's reasons, without repeating all the arguments advanced by the Parties, address what the Tribunal itself considers to be the determinative factors required to decide on the disputed Preliminary Issues.

136. The Tribunal has to consider whether the jurisdictional requirements established in Article 25(1) of the ICSID Convention and in the France-Hungary BIT are met.

137. Article 25(1) of the ICSID Convention provides in relevant part as follows:

“The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.”

138. The Tribunal notes, as mentioned by the Claimants,¹⁷⁷ that the Respondent does not challenge the existence of “a legal dispute”¹⁷⁸ between “a Contracting State” (Hungary, which is a Contracting State¹⁷⁹) and “a national of another Contracting State” (LCD and CD Internationale, two companies constituted in France,¹⁸⁰ which is also a Contracting State¹⁸¹). The Tribunal is further satisfied that the Claimants' shareholding in CD Hungary constitutes an “investment” for the purposes of Article 25(1) of the ICSID Convention.¹⁸²

139. The Tribunal also notes that, pursuant to Article 1 of the Treaty, the Claimants' shareholding in CD Hungary constitutes an “investment” and the Claimants fall within the definition of “investor”.¹⁸³

¹⁷⁷ Reply, para. 18.

¹⁷⁸ Memorial, para. 63; Reply, para. 18.

¹⁷⁹ Memorial, para. 66; Reply, para. 16. See also icsid.worldbank.org.

¹⁸⁰ Extrait Kbis de Le Chèque Déjeuner, 16 October 2013, C-0001; Extrait Kbis de C.D Holding Internationale, 12 September 2013, C-0002.

¹⁸¹ See icsid.worldbank.org.

¹⁸² Request, para. 110; Memorial, para. 65; and Reply, para. 15.

¹⁸³ Treaty, Article 1, CL-0001, which provides in relevant part as follows:

140. The Tribunal observes that the Respondent’s objection to the jurisdiction of this Tribunal is solely based on the alleged lack of consent to ICSID jurisdiction over claims brought under Article 3 of the Treaty.¹⁸⁴
141. The Tribunal is aware of the Respondent’s argument to the effect that “there could be no expropriation because the Claimants had no property right capable of being taken.”¹⁸⁵ The Tribunal notes, however, that the Respondent advances this argument as a defense on the merits, in relation to the applicable legal standard for expropriation under the Treaty, and that this argument is not advanced as a basis to challenge the jurisdiction of this Tribunal.
142. The following sections thus address the only issue in dispute between the Parties with respect to the jurisdiction of the Tribunal, namely the scope of the Respondent’s consent to ICSID jurisdiction.

B. Treaty interpretation and jurisprudence of other tribunals

143. In the legal arguments made in their written and oral submissions, the Parties rely on the VCLT and numerous decisions of other courts and tribunals. Accordingly, it is appropriate for the Tribunal to make certain general preliminary observations in this regard.
144. First of all, the Tribunal considers it useful to make clear from the outset that it regards its task in these proceedings as the very specific one of applying the relevant provisions

“1. The term ‘investment’ shall apply to assets such as property, rights and interests of any category, related to economic activity in any sector whatever, established after 31 December 1972, in accordance with the legislation of the Contracting Party in whose territory or maritime zones the investment was made, and particularly but not exclusively, to: . . . (b) Shares and other forms of participation, albeit minority or indirect, in companies constituted in the territory of either Party;

. . .

2. The term ‘investor’ shall apply to: . . . (b) Any body corporate constituted in the territory of either Contracting Party in accordance with its legislation and having its registered office there . . .”

¹⁸⁴ Counter-Memorial, paras. 16, 105-108 and 307(a); Respondent’s Post-Hearing Brief, paras. 2 and 37.

¹⁸⁵ Counter-Memorial, para. 162. See also paras. 163-177.

of the Treaty as far as necessary in order to decide on the relief sought by the Parties. No less, but also no more.

145. In order to do so, the Tribunal must, as required by the “General rule of interpretation” of Article 31 VCLT, interpret the Treaty’s provisions in good faith in accordance with the ordinary meaning to be given to them in their context and in light of the Treaty’s object and purpose. The “context” referred to in the first paragraph of Article 31 is given a specific definition in the second paragraph of Article 31 and comprises three elements: (i) the Treaty’s text, including its preamble; (ii) any agreement between the parties to the Treaty in connection with its conclusion; and (iii) any instrument which was made by one of the parties to the Treaty in connection with its conclusion and accepted by the other party to the Treaty. The “ordinary meaning” as defined above applies unless a special meaning is to be given to a term if it is established that the parties to the Treaty so intended, as it is stated in the fourth paragraph of Article 31.
146. As provided in the “Supplementary means of interpretation” of Article 32 VCLT, the Tribunal may have recourse to supplementary means of interpretation (i) in order to confirm the meaning resulting from the application of Article 31 VCLT, or (ii) when the interpretation according to Article 31 VCLT either leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable. Those supplementary means of interpretation include, but are not limited to, the preparatory work of the treaty and the circumstances of its conclusion.
147. The Parties have extensively referred to decisions of other tribunals. However, there is no dispute that in any event the decisions of other tribunals are not binding on this Tribunal. The many references by the Parties to certain arbitral decisions in their pleadings do not contradict this conclusion.
148. However, this does not preclude the Tribunal from considering arbitral decisions and the arguments of the Parties based upon them, to the extent that it may find that they shed any useful light on the issues that arise for the decision in the present case.

149. Such an examination is conducted by the Tribunal later in this Decision, after the Tribunal has considered the Parties' contentions and arguments regarding the various issues argued and relevant for the interpretation of the applicable Treaty provisions, while taking into account the above-mentioned specificity of the Treaty to be applied in the present case.

C. Respondent's procedural objection

150. The Respondent contends that the Claimants failed to assert, in their Request for Arbitration, jurisdiction in respect of their FET claims by operation of the MFN clause incorporating an arbitration clause from another BIT. The Tribunal is not persuaded by this argument given that the Respondent appears to have been aware from the outset that the Claimants would be asserting MFN-based jurisdiction in respect of their FET claims – this being understood by the Parties from the time of the first procedural meeting as likely to attract an objection to jurisdiction from the Respondent.

D. Wording of Article 9(1) and (2) of the Treaty

151. The Treaty provides as follows in Article 9(1) and the first subparagraph of Article 9(2):

“1. Any dispute relating to investments between one Contracting Party and an investor of the other Contracting Party shall, as far as possible, be settled amicably between the two Parties concerned or, failing that, by recourse to domestic means.

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

152. From this wording, and particularly the words “any dispute”, it is clear that subsection 1 provides the general principle to the effect that disputes are to be decided by “recourse to domestic means”.

153. Subsection 2 starts with “However” and thereby provides an exception to the above principle to the effect that dispossession measures as provided for in Article 5(2) “shall be settled” by arbitration.
154. The Respondent rests its argument on two pillars: first, that Article 9(1) excludes arbitration in respect of FET claims by providing for recourse in respect of such claims to domestic settlement means, viz., “shall ... be settled ... by recourse to domestic means”. On this reading, Article 9(1) is an express, forward-looking limitation in respect of FET claims that excludes arbitration in favor of domestic settlement. The second pillar of argument is that, insofar as Article 9(2) provides that “disputes concerning dispossession measures ... shall be settled [inter alia through arbitration]”, this must be construed as an implied exclusion of arbitration in respect of all claims other than dispossession claims.
155. As a matter of textual interpretation, Article 9(2) cannot be construed as excluding arbitration in respect of FET claims. It makes no mention of FET claims, whether directly or indirectly. It only addresses dispossession claims. While Article 9(2), read together with Article 9(1), addresses dispute settlement modalities in respect of all claims arising under the Treaty, Article 9(2) cannot by itself carry the weight of an implied exclusion of arbitration in respect of FET claims. It does not exclude anything.
156. The question, then, is whether Article 9(1) is to be construed as excluding arbitration in respect of FET claims.
157. Having regard only to the France – Hungary BIT, including the documents put before the Tribunal providing contemporary evidence of the understanding of the parties at the time of the conclusion of the Treaty, the clear and unavoidable conclusion is that the parties to the Treaty intended to exclude arbitration in respect of FET claims.
158. The common interpretation of both subsections of Article 9 leaves no doubt that the express intent of the parties to the Treaty was that only Article 5(2) measures are to and can be brought before an arbitral tribunal. This is confirmed by the documents submitted showing that the Hungarian as well as the French negotiators informed

during the ratification procedure that Hungary had insisted on the above limitation of arbitration and that France had accepted that in view of other aspects of “the deal” it found more relevant.¹⁸⁶

159. Article 9(1) cannot, however, be construed as a limitation on the scope of operation of the MFN clause. Had the parties intended the MFN clause to be so limited, it would have been straightforward to set out a restriction to this effect in express terms either in the MFN clause itself or elsewhere in the Treaty. They did not do so. To be capable of overturning the fundamental, non-discriminatory object and purpose of an MFN clause, the language of any limitation must have clearly and unambiguously in contemplation a restriction on the operation of the MFN clause itself. It is not sufficient that a clause elsewhere in the Treaty provides for a limitation in respect of some matter while leaving the MFN clause entirely intact. Any different approach would effectively denude the MFN clause of its essential purpose, namely, to ensure that investors afforded the benefit of the Treaty are not discriminated against by comparison to investors afforded the benefit of some other BIT.

160. The question that follows is whether the Article 9(2) exclusion, at the point at which the Treaty was concluded, is controlling going forward in the face of an MFN clause that contains no limitation or exclusion of its own in respect of its scope of application.

E. Construing an MFN clause

161. A useful starting point of analysis is the object and purpose of an MFN clause in a BIT.

162. The self-evident purpose of an MFN clause is to ensure that treatment accorded to investors under one BIT will be no less advantageous than treatment accorded to

¹⁸⁶ Report on the negotiations relating to the Hungarian-French investment protection agreement, prepared for the Ministry of Finance of the Government of the People’s Republic of Hungary on July 7, 1986, RL-0092; Memorandum dated 3 June 1986, RL-0129; Memorandum from the Ministry of Foreign Affairs regarding the Agreement with Hungary on the Reciprocal Promotion and Protection of Investments, Negotiations of July 1-2, Paris, dated July 8, 1986, RL-0130; Outgoing Telegram from the Ministry of Foreign Affairs regarding Negotiations on the French-Hungarian Agreement on the Reciprocal Promotion and Protection of Investments, dated July 11, 1986, RL-0131; and Memorandum from the Directorate for European Affairs regarding the French-Hungarian Agreement on the Reciprocal Promotion and Protection of Investments, dated December 19, 1986, RL-0132.

investors under another BIT. The purpose of such a clause is to ensure that there will be no discrimination between foreign investors.

163. There is no reason of principle, or of construction, that would restrict the operation of an MFN clause to treatment of a particular kind or form. So, for example, a provision in a later BIT that affords an investor the right to invest in a given sector without first obtaining the written consent of the host State to do so would in principle be subject to the operation of an MFN clause.

F. Application of the MFN clause to import provisions of future BITs

164. Further, the Tribunal has to examine whether the MFN clause in Article 4(1) of the Treaty might have to be interpreted as only allowing the import of provisions of other BITs which were concluded before the present Treaty or whether also provisions of future BITs of Hungary can be imported.
165. This question has been discussed by other tribunals under the principle of contemporaneity. The most recent summary of that discussion with regard to MFN clauses is provided by the ILC-Report of 2015:

“176. The principle of contemporaneity, relied on explicitly by the tribunals in *ICS* and *Daimler*, and implicitly in the decisions of some other tribunals, is not found specifically in the VCLT rules. Yet, it has been adverted to directly and indirectly by the International Court of Justice and by international tribunals. In *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, the Court referred to the ‘primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion.’ The Eritrea-Ethiopia Boundary Commission also endorsed what it referred to as ‘the doctrine of ‘contemporaneity’.”

177. Another view is that interpretation should be evolutionary, taking into account the development in the meaning of generic terms used in the treaty over time, particularly in the light of changes in the relevant law. However, as has been pointed out, while an evolutionary approach can be applied to generic “terms in a treaty which are by their very nature expressed in such general terms as to lend themselves to an evolutionary interpretation,” this cannot be done to ‘conflict with the intentions and expectations of the parties as they may have been expressed during the negotiations preceding the conclusion of the treaty.’

178. In the view of the Study Group, whether an evolutionary interpretation is appropriate in any given case will depend on a number of factors, including the intention of the parties that the term in question was to be interpreted in an evolutionary way, the subsequent practice of the parties, and the way they themselves have interpreted and applied their agreement. The approach of the *ICS* tribunal in seeking to ascertain the meaning of ‘treatment’ to which the MFN provision applied, by looking at how the term would have been understood at the time the UK-Argentina BIT was entered into, provides important guidance for interpretation but it cannot be regarded as necessarily definitive.”¹⁸⁷

166. The present Tribunal accepts this summary of the discussion. Applying the “factors” suggested by the ILC Study Group, for the case at hand, the Tribunal considers the following.

167. Regarding the first factor, neither the wording of Article 4(1) of the Treaty nor the file provide any information whether or not the two parties to the Treaty had *the intention ... that the term in question* [the MFN clause] *was to be interpreted in an evolutionary way*.

168. Also regarding the third factor, i.e. *the way they themselves have interpreted and applied their agreement*, no relevant information is available from the file in the present case. While there is information regarding the Parties’ interpretation of Article 9 as seen above, none is available regarding the interpretation of the MFN clause in Article 4(1). Further, to the Tribunal’s knowledge, the present case is the first one in which the application of the MFN clause in the BIT to dispute settlement is at stake.

169. However, regarding the second factor, i.e. *the subsequent practice of the parties*, there is information available in the present case. The list of all Hungarian BITs provided by the Parties in this arbitration shows the following:

- Hungary’s early BITs starting in 1986 (of which the one with France was the third in the same year) till 1989 all included limited arbitration clauses;

¹⁸⁷ CLA-0114, p. 39.

- The first unlimited arbitration clauses were included in its BITs in 1988 with Finland and in 1989 with Kuwait;
- Then unlimited arbitration clauses were included more often in its BITs starting in 1991;
- And starting in 1992, almost all of its BITs thereafter had unlimited arbitration clauses.

170. The Parties have also informed the Tribunal, as the list provided by them confirms, that from the very beginning, all of Hungary's BITs include MFN clauses.¹⁸⁸

171. Further, the Parties have informed the Tribunal, as again is confirmed by their list, that all of Hungary's BITs included FET clauses.¹⁸⁹

172. From the above information, the Tribunal concludes that, while two of the three factors identified by the ILC Report do not provide any guidance in the present case, the second factor, i.e. *the subsequent practice of the parties*, does provide guidance.¹⁹⁰

173. In agreement with the ILC Report, this Tribunal considers that, unless expressly so provided in the BIT, MFN clauses are not retrospective clauses, included in the BITs for purposes of ensuring that the parties incorporate thereby treatment afforded in BITs previously concluded. Not only would such an interpretation not be warranted by reference to the language of such clauses but such a reading would be contrary to the object and purpose of such a clause as it would necessarily result in differential treatment in any case in which there was a later-in-time comparator treaty. MFN

¹⁸⁸ The Parties informed that the text of the Estonia-Hungary BIT, which was signed on 1 January 2002 and has not yet been ratified, is not available.

¹⁸⁹ The Parties informed that the text of the Estonia-Hungary BIT, which was signed on 1 January 2002 and has not yet been ratified, is not available.

¹⁹⁰ In this regard, the Tribunal notes that "subsequent practice" is used here to describe the practice of the parties, whether separately or together, following the conclusion of the BIT in question, i.e., it is a broader category of conduct than the "subsequent practice" in contemplation in Article 31(3)(b) of the Vienna Convention on the Law of Treaties (namely, "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation"). This understanding is evident, and follows from, the third of the factors identified by the ILC requiring consideration.

clauses thus have an inherently prospective dimension, ensuring non-discriminatory treatment by reference to treatment that will be afforded in the future.

174. Since the MFN clause, by its nature, has a moving target and scope with the evolution of past and future BITs, Hungary's BIT practice since 1992 shows that an open arbitration clause including FET and MFN clauses is by now its normal standard. Achieving the same result in the present case via the MFN clause in the Hungary-France BIT thus would in no way lead to a situation unusual for Hungary today.
175. Neither the wording of Article 4(1) nor the file provide any evidence that it was understood to refer only to past BITs. It follows that, in the Tribunal's view, the MFN clause in the France – Hungary BIT had in general contemplation treatment that may be afforded to others in the future that is not afforded to the beneficiaries of the BIT then being concluded.

G. Limits on the scope of application of an MFN clause

176. It would be open to parties to a BIT to restrict the scope of an MFN clause included in a treaty. For example, an MFN clause may provide, in express terms, that it does not apply in respect of certain kinds of treatment or that it only applies in the case of BITs with certain other States (e.g., European States). In principle, an express limitation in an MFN clause itself, or elsewhere in the BIT but with respect to the MFN clause, would have the effect of limiting the scope of application of the clause.
177. More difficult is the question of whether an MFN clause may contain an implied limitation, either by reference to the words in the clause itself or implied by reference to some other term in the BIT. While this would ultimately turn on the language in question, unrestricted language in an MFN clause should, as a matter of treaty interpretation, give rise to a presumption against limitation.
178. A further question that arises is whether the scope of application of an MFN clause may be limited to certain types of rights. For example, does an MFN clause in a treaty have the effect of reading into the treaty rights accorded only in another treaty of the

same character, addressing the same subject matter, or does it incorporate rights writ large.

179. The answer to this question is likely to depend on the specific formulation of the particular MFN clause and particular treaty. So, for example, an MFN clause in a treaty that addresses trade in agricultural goods may be limited in its scope of application to treatment accorded in the agricultural sector, rather than applying more generally. This is the *ejusdem generis* principle.
180. In the case of BITs, language along the lines of “treatment accorded to investors of the most-favoured nation” will have a self-limiting effect on the scope of application of the clause. An MFN clause along these lines will not, as a matter of construction, apply in the case, for example, of treatment of persons who are not investors. Equally, an investor could not rely on an MFN clause in a BIT to afford him/her/it rights that are derived from a non-investment treaty, for example, a visa waiver treaty in respect of tourist travel.
181. The question that follows is whether there are any inherent or otherwise proper limitations on the scope of application of an MFN clause in a BIT to dispute settlement provisions in another BIT.
182. The dispute settlement provisions of a BIT do not give rise to a self-standing right to pursue arbitration independently of an alleged breach of the rights protected in the BIT. In other words, an investor who might otherwise be in a position to avail him or herself of a right under a BIT could not rely on a right to bring arbitral proceedings against the host State in respect of a matter that is not addressed in the BIT. The investor could not, for example, rely on a BIT arbitration clause to bring arbitral proceedings in respect of a refusal of a tourist visa that had nothing to do with an investment.
183. This being the case, a right to bring arbitration proceedings pursuant to a clause in a BIT is a right that is contingent on the alleged violation of a right protected in that BIT.
184. It follows, further, that, for purposes of assessing the limits on the scope of application of an MFN clause in a BIT in respect of the dispute settlement provisions in another

BIT, it is necessary to have regard to the scope of the rights protected in that other BIT. A claimant could not, for example, rely on an MFN clause in a BIT to incorporate a dispute settlement right from another BIT if that other BIT did not contemplate dispute settlement in respect of the right asserted by a claimant under the BIT pursuant to which the claimant was entitled.

H. Wording of Article 4(1) of the Hungary – France BIT

185. Article 4(1) of the Treaty provides as follows:

“Each Contracting Party shall accord in its territory and maritime zones, to investors of the other Party, in respect of their investments and activities in connection with such investments, the same treatment accorded to its own investors or the treatment accorded to investors of the most-favoured nation, if the latter is more advantageous.”

186. The wording of the MFN clause in Article 4(1) of the Hungary – France BIT is rather wide. Obviously it does not contain any express exclusion to the effect that it does not apply to dispute settlement.

187. The Respondent advances four points of textual interpretation of the MFN clause in support of its position: (i) ICSID arbitration is not accorded in the “territory” of a Contracting Party;¹⁹¹ (ii) the term “activities in connection with ... investments” cannot be construed to include resort to arbitration;¹⁹² (iii) the term “treatment” cannot be construed to include the right to resort to arbitration;¹⁹³ and (iv) the right to resort to arbitration cannot be said to be “more advantageous” treatment than the right to resort to dispute settlement under domestic law.¹⁹⁴

188. It is clearly important to have careful regard to the words used in the MFN clause. The clause must, however, be interpreted in a holistic manner, with regard to its context

¹⁹¹ Transcript Day 2, p. 19:15 to p. 20:24.

¹⁹² Respondent’s Post-Hearing Brief, para. 6.

¹⁹³ Respondent’s Post-Hearing Brief, paras. 6 and 22-23.

¹⁹⁴ Respondent’s Post-Hearing Brief, para. 23, and Transcript Day 2 p. 8:22 to p. 9:11.

and its object and purpose. Individual words cannot be given a meaning, however merited this might be when viewed in isolation, that would be at odds with the object and purpose of the clause as a whole.

189. The evident purpose of the MFN clause was to ensure that the conditions of investment of investors under the Treaty corresponded to those accorded to MFN investors. The preamble of the Treaty makes it clear that this is what the parties were concerned with, viz.: “Desiring to strengthen their economic cooperation by creating favorable conditions for French investments in Hungary and Hungarian investments in France.”
190. The ability of an investor to take steps to protect his/her/its investment, including by resort to dispute settlement proceedings, is an integral component of the conditions of investment and will often be material to the decision to invest in the first place. The importance of this element is illustrated by the fact of investor – State dispute settlement provisions in BITs, as well as by the *raison d’être* of ICSID itself.

1. “Territory”

191. Having this in mind, the term “territory” in the MFN clause cannot be construed as imposing a limitation on the operation of the MFN clause to exclude reference to arbitration that takes place internationally. The issue is the treatment accorded by a Contracting State to investments and connected activities by qualifying investors. If the object and purpose of the clause is not to be defeated by devices that impose extra-territorial conduct requirements, the term “territory” must be construed as a reference to the jurisdiction of the Contracting Party, including as regards such rights as may be afforded the investor, as part of the conditions of investment, to safeguard his/her/its investment through arbitration proceedings which are independent of the Contracting Party in question. Delocalised dispute settlement is at the heart of the Treaty edifice concerning conditions of investment. To construe the word “territory” as imposing a limitation on the scope of an MFN clause would risk eroding such a clause in a fundamental way.
192. It is also the case that an investor wishing to pursue an international arbitration claim will have a locus in the territory in which the investment is located. If the meaning of

the word “territory” is not to become a matter of sterile debate caught up in the formalism of where a decision to resort to arbitration is taken, the seat of a tribunal and where its hearings are held, the term must be construed in the context of the provision as a whole and its object and purpose.

2. “Activities” and “treatment”

193. The same analysis applies to the construction of the terms “activities” and “treatment” in the MFN clause. It is material that the term “treatment” refers to what is to be accorded to the investor, not the investment. An investor’s entitlement to resort to arbitration under a BIT must be construed as an integral part of the treatment accorded to him/her/it. This applies, too, to the meaning of the term “activities” in connection with an investment. If the effect of an MFN clause is not to be put at significant risk, activities in connection with an investment must be construed as activities associated with the protection of that investment. A different interpretation would mean that restrictions in respect of domestic proceedings that imposed a differential and discriminatory standard on a qualifying investor would be excluded from the operation of the MFN clause.

3. “More advantageous”

194. The final question is whether the right to resort to arbitration is “more advantageous” treatment than the right to resort to dispute settlement under domestic law. Delocalised dispute settlement is at the very heart of the Treaty edifice concerning conditions of investment. Excluding the right to resort to arbitration for investors under one BIT while allowing it for investors under another BIT is self-evidently differential treatment. Differential treatment is discriminatory when it treats comparable circumstances and/or persons differently. Whether or not arbitration is in fact more advantageous than domestic processes in any particular case is beside the point. The MFN clause is engaged by the fact that qualifying investors are denied treatment afforded to comparable investors under another BIT.

4. Article 25(1) of the ICSID Convention

195. The remaining question is whether “consent in writing” to submit a dispute to ICSID settlement, under Article 25(1) of the ICSID Convention, can properly be established by reading written consent into the BIT by operation of an MFN clause from another BIT where such written consent is manifest.
196. The requirement of written consent is invariably derived from more than one text. A respondent’s written consent usually takes the form of a treaty commitment. A claimant’s written consent usually takes the form of an undertaking made on the submission of a request for arbitration. There is no reason of principle why a respondent’s written consent cannot be based, in a given case, by written consent evident in one treaty being read into another, provided that there is a proper basis for reading such consent across.
197. In the present circumstances, there is no impropriety in resort to the MFN clause to find the Respondent’s written consent as conveyed in an analogue BIT. The Respondent’s written consent is manifest in that other BIT. It is properly read into the France – Hungary BIT by operation of the MFN clause.

I. Context of other provisions in this Treaty

198. Articles 4(3), 4(4) and 5(3) provide as follows:

“3. Such treatment shall not, however, include privileges which may be extended by a Contracting Party to investors of a third State by virtue of its participation in or association with a free trade area, customs union, common market or any other form of regional economic organization.

4. This Agreement shall not extend to privileges accorded by one of the Contracting Parties to any third State, by virtue of a convention for the avoidance of double taxation or any other convention on taxation.

...

3. Investors of either Contracting Party, whose investments have suffered losses as a result of a war or any other armed conflict, state of national emergency or uprising in the territory or maritime zones of the other Contracting Party, shall be accorded by the latter Party treatment no less

favourable than that accorded to its own investors or to investors of the most favoured nation. They shall, in any event, receive adequate compensation.”

199. The exceptions in Article 4(3) and 4(4) of the Treaty make exceptions to the MFN for specific scenarios as they are also found often in MFN clauses of other BITs: regional economic organizations and conventions on taxation. In such circumstances the application of an MFN clause would result in extending these economic organizations and tax conventions to non-participating states which the participating other states want to avoid.
200. These two express exceptions to the MFN clause are of a kind that they cannot be used to say that any other exceptions were not possible if they are not mentioned here. Therefore they cannot provide an *argumentum e contrario* to be used to argue that no further exceptions are possible to the application of the MFN clause.
201. On the other hand, the additional MFN-scope provided by Article 5(3) also cannot be used for the contrary conclusion to say that 4(1) cannot be used to import arbitration from other BITs, because such an import would have to be mentioned by an additional clause in the same way as in 5(3). The scenarios addressed in Article 5(3) such as war and national emergency are so specific that, on the basis of general public international law, it would be doubtful whether and in which way the MFN clause might be applicable. Article 5(3) clarifies that.
202. These three other provisions deal with very specific scenarios which make their express inclusion in the Treaty plausible. Thus, from these provisions in our Treaty, no conclusions can be drawn for our question either in favor or against an import of arbitration via the MFN clause. This interpretation for the Treaty at hand is confirmed in general by the ILC Report’s conclusion (IV.3.d.ii) that the *expressio unius* principle may be helpful but not decisive.¹⁹⁵

¹⁹⁵ CLA-0114.

J. Application of the MFN clause to import arbitration provisions

203. It seems to be undisputed that MFN provisions cannot be interpreted as completely open ended. This is confirmed by the 2015 ILC Report¹⁹⁶ referring to draft Article 14 of the 1978 ILC Draft Articles.

204. However, in the present case, the question is more limited: whether MFN clauses are capable of importing arbitration clauses from other BITs. In this regard, the present Tribunal agrees with the 2015 ILC Report:

“Although controversial in some of the earlier decisions of tribunals, there is little doubt that in principle MFN provisions are capable of applying to the dispute settlement provisions of BITs.”¹⁹⁷

205. For the present case, it is not necessary to decide whether this conclusion is also correct if the BIT includes no arbitration clause at all. The Treaty at hand does include an arbitration clause in Article 9(2). The only question is whether the scope of that clause can be extended to provide jurisdiction not only to expropriation measures, but also to FET. For this more limited question, indeed, there can be no doubt that, in principle, the MFN clause in the Treaty is capable of importing such an extension from another BIT.

K. No renegotiation after 10 years under Article 12

206. According to Article 12, the Treaty could have been re-negotiated 10 years after it entered into force. This would have been an opportunity for both parties to suggest to change Article 9 and turn it into an unlimited arbitration clause. The parties to the Treaty did not do so. At the relevant time, they do not seem to have been aware of any initiation of an arbitration, and even less of the MFN issue in this context. And even if they were aware, they might not have considered any need to renegotiate Article 9, because they understood the MFN clause to be applicable. Therefore, the automatic continuation of the Treaty according to Article 12 cannot be seen as a reason for or

¹⁹⁶ CLA-0114, para. 165.

¹⁹⁷ CLA-0114, para. 162.

against the application of the MFN clause for the import of a settlement provision from another BIT.

L. Relevant jurisprudence of other tribunals

207. In view of the large body of jurisprudence of other tribunals on the issue at hand, i.e. the application of MFN clauses to dispute settlement, and as the Parties have extensively argued on that jurisprudence, the Tribunal considers it appropriate to examine the relevance of that jurisprudence for its present case, in particular whether it gives cause to reconsider any of the above conclusions.
208. In this context, the Tribunal recalls from its considerations above that in any event it is undisputed that the decisions of other tribunals are not binding on this Tribunal. The many references by the Parties to certain arbitral decisions in their pleadings do not contradict this conclusion.
209. The Tribunal sees no need to comment on all decisions dealing with the disputed issue. The most recent and well researched summary of the relevant jurisprudence is again provided by the 2015 ILC Report. From this Report, the Tribunal, taking into account the wording of Article 4(1) of the Treaty at hand, considers the following conclusions on the practice of the various tribunal decisions as relevant:

“195. Aside from the different interpretative approaches already identified, there appears to be a certain commonality in the interpretation of certain types of wording in MFN clauses.

196. First, where the MFN clause provides simply for “treatment no less favourable” without any qualification that arguably expands the scope of the treatment to be accorded, tribunals have invariably refused to interpret such a provision as including dispute settlement.

197. Second, where the MFN clause contains clauses that refer to ‘all treatment’ or ‘all matters’ governed by the treaty, tribunals have tended to accord a broad interpretation to these clauses, and to find that they apply to dispute resolution provisions. In only one case has a broadly worded clause not been treated as applying to dispute settlement.

198. Third, where the MFN clause qualifies the treatment to be received by reference to ‘use’, ‘management’, ‘maintenance’, ‘enjoyment’,

‘disposal’, and ‘utilization’, a majority of tribunals have found that such clauses are broad enough to include dispute resolution provisions.

199. Fourth, in the two cases which link MFN directly to fair and equitable treatment, neither concluded that the clause covers dispute settlement provisions.

200. Fifth, in the cases where a territorial limitation has been placed on an MFN clause, the result has been mixed. Some cases have concluded that the territorial limitation is irrelevant to deciding whether dispute resolution provisions are concerned, while others have held that a territorial limitation clause prevents the inclusion of international dispute settlement provisions within an MFN clause.

201. Sixth, in no case where MFN clauses limit their application to investors or investments “in like circumstances” or “in similar situations” has a tribunal treated as relevant the question of whether the clause applies to dispute settlement provisions.

202. Such an analysis indicates past practice, and does not constitute a statement about how cases will be decided in the future. Since investment tribunals are ad hoc bodies and since the exact provisions and context of MFN clauses vary, it is impossible to tell in advance how the members will decide, even if some or all of the individuals have already decided cases involving MFN provisions. However, where MFN clauses are capable of a broader interpretation, it appears that tribunals are more inclined to treat them as applying to dispute settlement provisions. In the Study Group’s view, this provides preliminary guidance to States on how particular wording might be treated by tribunals.”¹⁹⁸

210. From these summaries, the second, third, and fifth scenarios seem to be of particular interest in view of the specific wording of Article 4(1) of the Treaty at hand. They confirm the ILC Study Group’s conclusion that *where MFN clauses are capable of a broader interpretation, it appears that tribunals are more inclined to treat them as applying to dispute settlement provisions.*

211. In the view of the present Tribunal, the broad wording of Article 4(1) of the Treaty is covered by this conclusion. It shows that the interpretation the present Tribunal has given to Article 4(1) above is confirmed, but certainly not discredited, by the earlier jurisprudence of other tribunals on this issue.

¹⁹⁸ CLA-0114, paras. 195 *et seq.*

212. For plausible reasons, the Parties in the present dispute have particularly commented on the Decision in the *Rosinvest* case,¹⁹⁹ because the presiding member of the present Tribunal also chaired the Tribunal in *Rosinvest*. In view of the extensive representations of the Parties, the Tribunal feels it should comment briefly on these arguments of the Parties.
213. At the outset again, it should be emphasized that no member of a tribunal is bound by the views it took in an earlier case, particularly if dealing with another BIT and involving different states. And it is also noted that the Award in *Rosinvest* expressly limits its conclusions to the specific circumstances of that case and the two BITs relevant in that dispute (section 137). Further, the Tribunal notes that the Hungary-France BIT in the present dispute and the Russia-UK BIT in *Rosinvest* are different in many ways. On the other hand, there are some common features with regard to the dispute resolution and MFN clauses: In both BITs, the States included arbitration clauses, but limited them in their scope. And for both BITs it is clear that the limitation resulted from one State insisting on it (Hungary and Russia) and the other (France and the UK) accepting it, resulting in a clear consent of both States on the limitations of the scope of the respective arbitration clauses. And in both cases we have no evidence that the two States, when negotiating the BIT, discussed or at least considered whether the MFN clause could extend the limits of the scope of arbitration. The MFN issue therefore was and is in both cases whether the MFN clause can go beyond this consent by importing arbitration clauses from later BITs to the effect that arbitration jurisdiction has to be accepted beyond the originally agreed limited scopes of the express arbitration clauses. Further, the nature of the limitations is not very different in both cases: In *Rosinvest* it excludes whether an expropriation occurred and in the present case whether the FET standard has been breached. The different wording of the MFN clauses in Article 4(1) of the Hungary-France BIT and Article 3 of the UK-Russia BIT in *Rosinvest* also do not seem to require different results. Therefore, while

¹⁹⁹ CLA-0128.

not all other details are identical or similar, the above common features would speak in favor of a similar result in both cases.

214. With regard to the other decisions of tribunals referred to by the Parties, while the issue of MFN application is a common feature, just as in *Rosinvest*, they had to deal with other BITs, between other states, and with no identical wording and context as found in Articles 9, 4 and 5 of the BIT in the present case. This also applies to the most recent decision of the Appeal Court Stockholm in the *Quasar de Valores* case (reported in GAR 23.1.2016) which the present Tribunal only refers to for completeness without relying on it as the Parties in the present case have not had an opportunity to comment on it. The Tribunal agrees with the final conclusion of the ILC Report:

“Whether MFN clauses are to encompass dispute settlement provisions is ultimately up to the States that negotiate such clauses. Explicit language can ensure that an MFN provision does or does not apply to dispute settlement provisions. Otherwise the matter will be left to dispute settlement tribunals to interpret MFN clauses on a case-by-case basis.”²⁰⁰

215. For its case at hand, in view of the above considerations, the Tribunal comes to the result that, while its conclusions are not in full agreement with those of all other tribunals which have addressed the disputed issue, its conclusions in the present case not only represent its own best judgement of the matter, but also are consistent with the modern development of the jurisprudence as so well summarized by the ILC Report of 2015.

M. The Tribunal’s jurisdiction regarding Article 3 of the Treaty

216. After its above conclusion that the MFN clause in Article 4(1) may indeed serve to import the extension of the Tribunal’s jurisdiction beyond the limit provided in Article 9(1) and (2), the Tribunal now turns to the implementation of that conclusion.

217. The Respondent, in its Counter-Memorial, requests the Tribunal as follows:

²⁰⁰ CLA-0114, para. 216.

“To decline jurisdiction over this dispute with respect to Claimants’ claims under Article 3 of the BIT due to the absence of Respondent’s consent to ICSID jurisdiction over such claims.”²⁰¹

218. The Claimants, in their Post-Hearing Brief, request the Tribunal to:

- “Reject the Respondent’s jurisdictional objections in their entirety;”²⁰² and
- “Decide that it has jurisdiction over the Claimants’ claims relating to Article 3 of the France-Hungary BIT”.²⁰³

219. In response to the Tribunal’s question in Procedural Order No. 3, in their Post-Hearing Brief, the Claimants explained that they now rely solely on the more favorable dispute settlement provisions contained in the Lithuania-Hungary BIT. For this selection, the Claimants provided the following considerations:

- “First, unlike the consent to arbitration found in Article 9(2) (alone) of the France-Hungary BIT, the Lithuania-Hungary BIT contains consent to the submission of ‘[a]ny dispute’ to arbitration. This consent took effect immediately. The Claimants would therefore have the option to pursue their FET claims through international arbitration.
- Second, unlike certain other BITs concluded by the Respondent, the Lithuania-Hungary BIT does not impose a requirement to exhaust local remedies. It requires ‘negotiations’ to have continued for ‘a period of six months’, but it does not oblige an investor to submit disputes to the domestic courts prior to commencing arbitration.
- Third, unlike the Respondent’s BITs with certain other countries, the dispute settlement clause in the Lithuania-Hungary BIT does not contain a ‘fork-in-the-road’ provision.
- For the avoidance of doubt, and subject to the caveat set out in section 2.3.3 below, the Claimants do not rely upon the FET provisions in the Hungary-Lithuania BIT (or any other third State treaty). The Claimants rely solely on the more favourable

²⁰¹ Counter-Memorial, para. 307(a). See also Respondent’s Post-Hearing Brief, para. 37.

²⁰² Claimants’ Post-Hearing Brief, para. 66.

²⁰³ Claimants’ Post-Hearing Brief, para. 66.

treatment granted to Lithuanian investors under Article 8 (dispute resolution) of the Lithuania-Hungary BIT.”²⁰⁴

220. Article 8 of Hungary’s BIT with Lithuania provides as follows:

“Article 8

Settlement of Investment Disputes between a Contracting Party and an Investor of the other Contracting Party

Any dispute which may arise between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of that other Contracting Party shall be subject to negotiations between the parties in dispute.

If any dispute between an investor of one Contracting Party and the other Contracting Party cannot be thus settled within a period of six months, the investor shall be entitled to submit the case either to:

/a/ the International Centre for Settlement of Investment Disputes (ICSID) having regard to the applicable provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington D.C. on 18 March 1965, in the event both Contracting Parties shall have become a party to this Convention; or

/b/ an arbitrator or international ad hoc arbitral tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). The parties to the dispute may agree in writing to modify these Rules. The arbitral awards shall be final and binding on both parties to the dispute.”

221. Taking into account its considerations above in this Decision, and that the BIT with Lithuania also includes an FET provision, the Tribunal agrees that the Respondent’s consent to international arbitration of “any dispute” with Lithuanian investors constituted (and constitutes) more favorable treatment, and this treatment was automatically accorded to the Claimants by virtue of the MFN provisions contained in Article 4(1) of the Treaty.

222. On this basis, the Tribunal’s jurisdiction includes disputes concerning the Respondent’s breach of its obligation to accord the Claimants’ investments fair and

²⁰⁴ Claimants’ Post-Hearing Brief, para. 7.

equitable treatment under Article 3 of the Treaty, and is not limited to the Respondent's breach of its obligations concerning expropriation under Article 5(2).

N. Costs

223. In their Reply on Objections to Jurisdiction and Response to Request for Bifurcation, the Claimants request the Tribunal to:

“Order the Respondent to pay the Claimants’ costs, including legal fees, incurred as a result of any eventual bifurcation of these proceedings”.²⁰⁵

224. In its Counter-Memorial, the Respondent requests the Tribunal to:

“Award Hungary all of the costs and expenses incurred in these proceedings, including attorney’s fees”.²⁰⁶

225. In their Post-Hearing Brief, the Claimants requested the Tribunal to:

“Order the Respondent to pay the Claimants’ costs, including legal fees, incurred as a result of the Respondent’s jurisdictional objections and the bifurcation of these proceedings.”²⁰⁷

226. In its Post-Hearing Brief, the Respondent submits that “if [Hungary] is successful, the Claimants should be required to bear the full costs associated with the jurisdictional phase of these proceedings.”²⁰⁸ The Respondent also asserts that, “in the event that Hungary is not successful in these proceedings . . . it would be most appropriate for the Tribunal to reserve its decision on costs until the Final Award.”²⁰⁹

227. Using the option provided in Article 28 of the ICSID Rules, the Tribunal finds it appropriate to decide on the costs related to the bifurcation and procedure regarding the Preliminary Issues at a later stage of the procedure.

²⁰⁵ Reply, para. 162.

²⁰⁶ Counter-Memorial, para. 307.

²⁰⁷ Claimants’ Post-Hearing Brief, para. 66.

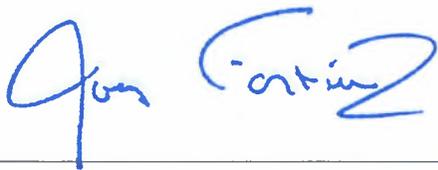
²⁰⁸ Respondent’s Post-Hearing Brief, para. 34.

²⁰⁹ Respondent’s Post-Hearing Brief, para. 35.

O. Decisions

228. For the reasons set out above, the Tribunal decides and declares as follows:

- i. The Respondent's objections against the Tribunal's jurisdiction regarding the claims for alleged breach of Article 3 of the Treaty between Hungary and France are dismissed.**
- ii. The Tribunal has jurisdiction over all the claims raised.**
- iii. The decision on costs is reserved for a later stage of the procedure.**



The Honourable Yves Fortier, PC CC OQ QC

Arbitrator

Date: 2 March 2016



Sir Daniel Bethlehem, QC

Arbitrator

Date: 3 March 2016



Professor Dr. Karl-Heinz Böckstiegel

President of the Tribunal

Date: 29 Feb. 2016